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EDITED BY

EMORY R. JOHNSON, PH.D., SC.D.

GOVERNMENT REGULATION  
OF TRANSPORTATION

# THE APPLETON TRANSPORTATION SERIES

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## GOVERNMENT REGULATION OF TRANSPORTATION

By Emory R. Johnson



# GOVERNMENT REGULATION OF TRANSPORTATION

*by*

EMORY R. JOHNSON, Ph.D., Sc.D.

*Professor Emeritus and Lecturer in Transportation  
Wharton School of Finance and Commerce  
University of Pennsylvania*



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## PREFACE

THE GOVERNMENT'S relation to business in the United States has become a subject of vital importance to national welfare. It is a question in which the public as a whole is keenly interested, and concerning which, as might be expected, conflicting opinions are held. The present volume deals with one phase of this problem, the government regulation of transportation. For more than half a century, the American people, through their state and Federal governments, have been seeking to formulate and enforce a wise transportation policy, one that not only will minimize misconduct, but will be constructively beneficial to the carriers regulated and to the public they serve.

In adjusting the government's relation to transportation services and their performance, it is necessary for each country to decide whether the financial, economic, and social conditions of the country concerned call for government ownership and operation of railroads and possibly other transportation facilities, or for their private ownership and operation under government regulation. The conditions prevailing in the United States make desirable the continuance of private ownership and operation. For reasons that are stated, it will be to the advantage of the American people to regulate, rather than to perform, transportation services.

To develop and carry out a wise policy of government regulation of transportation, it is necessary to have a clear concept of the objectives to be attained and of the principles that should control legislative and administrative action. For this reason an attempt is made in the early part of this volume to state what those objectives and principles should be. This statement of objectives and principles leads logically to an account of the state and Federal authorities, legislative and judicial, that have jurisdiction in the regulation of transportation and carriers in the United States. The people of the United States have divided legis-

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lative authority between the state and Federal governments, and the changes that have been made and are taking place in the boundary line separating state and Federal jurisdiction as a result of the economic and political development of the United States are well illustrated by the evolution of transportation regulation. Likewise, the influence upon the development of political institutions of having a judiciary which is an independent part of the Government and which has the power to interpret, and determine the validity of, legislative action is clearly shown in the evolution of court review of state and Federal legislation for the regulation of transportation.

A discussion of government regulation of transportation in the United States naturally includes the consideration in logical sequence of the major problems and policies of the regulation of railroads, of railroad financiering, services, labor, freight, and passenger charges, and the consolidation of railroads with each other and with other carriers. In the treatment of the Government's relations to transportation and carriers by waterways, highways, and airways, it has seemed desirable to consider both aid and regulation by the Government. The facilities of transportation by water, road, and air are in part provided and maintained by the state and Federal governments. To some extent local, rural, and municipal governments participate in furnishing and supporting facilities. Government aid and regulation are such closely related parts of the public's policy towards transportation and carriers upon the waterways and highways and in the air that a discussion of government regulation without a consideration of public aid would not be adequate and satisfactory, if, indeed, it were practicable.

Throughout this treatise upon government regulation of transportation, emphasis has been placed upon the fact that the several agencies or kinds of transportation are interrelated, that the railroads, pipe-lines, waterways, highways, and airways are parts of a general transportation system, and that the facilities operated and the services performed by all the agencies of transportation should be coördinated. While the railroad, highway, and other carriers are competitors, their services are also complementary to each other. It should be the aim of the Government so to regulate

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the competitive relations of the several kinds of carriers that each will secure the traffic that it can handle most economically and efficiently. At the same time the Government should so coördinate the facilities and services of the several classes of carriers that the country's transportation services as a whole will be performed in the best possible manner and at a minimum cost.

Such is the goal to be sought by the government regulation of transportation. To attain the goal it will be necessary to apply to all classes of carriers like principles of regulation. The legislation embodying the principles will be so cast for each kind of transportation as to reflect its special characteristics and requirements. The aim of the Government must be a national transportation policy for the regulation of a national system of transportation composed of several interrelated and coördinated parts.

E. R. J.



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PART I

THE GOVERNMENT'S RELATION TO  
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# GOVERNMENT REGULATION OF TRANSPORTATION

## CHAPTER I

### INTRODUCTION: IMPORTANCE AND SCOPE OF GOVERNMENT REGULATION OF TRANSPORTATION

TRANSPORTATION has long been regarded as a business activity and a service vested with a public interest. The common law early imposed upon the common carrier obligations incident to the performance of a service upon which the public as a whole was dependent. The ferryman, the stage-coach operator, and other common carriers were required to serve all who desired their services, and for charges that were neither extortionate nor unjustly discriminatory as among those served. Common law and, later, statute law gave transportation this status, because the service made possible the production and distribution of the necessities of life, and because, as economic and social evolution progressed, transportation facilities and services came more and more to influence the changes not only in economic activities but also in social organization and in conditions affecting many phases of human welfare. It is because of its vital relation to each individual and to society as a whole that transportation must needs be regulated by the Government.

Those who perform transportation services are engaged in a business activity. To regulate transportation is to regulate one important phase of business; and because of its interlocking relation to all business affairs and to social life in general, transportation was the first business any part of which was thoroughly regulated by the Government. In fact, not all kinds of transportation are yet comprehensively regulated. In the United States and in most countries, government regulation of transportation is in

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an evolutionary stage. Until about 1870, the states, and up to 1887, the United States, left transportation facilities and agencies practically unregulated. The state and Federal governments had constructed or aided in the construction of highways, had improved rivers and built canals, and had provided a part of the funds by which some of the railroads were brought into existence.

Government improvement of inland waterways and construction of highways did not stop when regulation began; but the rapid growth of railroad mileage during the latter half of the nineteenth century, and the superiority of the railroad as a transportation facility over the highways and inland waterways of that time (other than the Great Lakes), slowed down highway and inland waterway development. Then motor transportation created an imperative demand for hard-surfaced roads; while efficiently engined vessels specialized with reference to their services displaced the mule-towed barge on canals and the low-powered, small craft on the rivers. As a result, the Federal Government is carrying out an extensive program of highway construction and inland waterway improvements. The states are also devoting large sums to highway construction, and the states and the Federal Government are actively promoting and aiding air transportation.

The recent rapid rise of highway transportation greatly augmented government aid and created conditions that made manifest the necessity for more comprehensive regulation of highway carriers both by the states and the Federal Government. Transportation upon dirt roads by muscle power may not have needed regulation, but that can not be said of transportation upon hundreds of thousands of miles of good roads busily used by buses and trucks operated by common, contract, and private carriers that make the highways the arteries of a large share of the country's total travel and traffic. The intense competition and the consequent unfair discriminations that developed in the railroad service and which were brought under control by government regulation reappeared in the competitive relations of rail and road carriers. The operators of buses and trucks unhampered by Federal law and but partially restrained by state legislation were under the pressure of necessity resulting from a prolonged business depression; and, in their struggle to secure traffic that might



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be moved by rail or water, they indulged in practices injurious to the public and to themselves. Regulation of motor carriers by the states has been supplemented by their regulation by the Federal Government in accordance with the provisions of the Motor Carrier Act of 1935.

There is a special present reason for considering the principles that should control in the regulation of the transportation business and for reviewing the experience that this country has had in applying those principles in legislation and administration. The rapid substitution of large-scale for small-sized industry, as the result of the invention and ever-enlarging use of machinery, has introduced into the business of production and distribution competitive practices injurious both to business and to the public; practices that call for restraint, preferably by the associated effort of organized business acting under such government rules as experience may show to be necessary. What has been learned in the government regulation of railroads will be helpful, not only in extending adequate and effective regulation to carriers by road and water and air, but also in solving the larger and more difficult problem of eliminating unfair and socially injurious practices from production and distribution.

It is also not impossible that the experience of the Government in seeking to further the control of competitive practices by business itself through associated action may reveal the possibility of substituting self-control for a part of the government regulation now exercised in the case of rail and motor carriers, and presumably to be exercised as regards other carriers in the future. Large-scale organization of business, whether of transportation, production, or distribution, prepares the way for, and makes easier, its self-control by associated action. In each line of business, those concerned can more effectively coöperate in formulating and enforcing "the rules of the game." Such rules can be required by the Government to conform to principles established by legislation, the performance of its task being made easy for the Government in proportion to the extent and efficiency of the organization of business. As will be pointed out later when the subject is discussed, the time has already arrived when the Federal and state governments may safely entrust to the Association

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of American Railroads some regulatory activities now exercised by public authority, regulatory measures necessary when adopted but which can now be wisely and more economically enforced by the associated railroads.

Although the scope of government regulation of transportation has not reached its ultimate limits, and will not have attained its necessary goal until the same general principles, with appropriate variations in detailed requirements, have been applied to the regulation of all of the several agencies of transportation, there has been an expansion of regulation by the states and the Federal Government over a period of more than three score years; and, from the experience thus had, much light is thrown upon the road ahead that is yet to be traveled.

It was logical that regulation of transportation both by the states and the United States should have begun with the railroads. When Massachusetts in 1869, and Illinois in 1870, enacted their first laws for the regulation of carriers by rail, the inland waterways afforded facilities for but a small share of the traffic seeking long-distance movement, while the dirt roads and horse-drawn vehicles provided only local service. The railroad had already become the country's main transportation facility. The railroad mileage was rapidly increasing and rival companies, unhampered by government authority, had begun a competitive warfare that led to discriminations in rates and services as among persons, places, and commodities that were most injurious to the public and were costly to investors in the railroads.

Political authority in this country being exercised partly by the states and partly by the Federal Government, it was inevitable that, in regulating the railroads that are engaged in both intrastate and interstate transportation, there should be uncertainty as to the scope and limits of the power of the states over railroads. The first question concerning this that was raised in the courts was whether the state legislature could fix the rates charged by corporations that had been given the right by the charters granted by the state to make reasonable charges for their services. The railroads contended that the reasonableness of their rates was a question of equity to be passed upon by the courts, and that the state legislature could not fix railroad rates;

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but the Supreme Court upheld the "Granger Laws" as a valid exercise of legislative authority.<sup>1</sup>

While the decision of the Supreme Court in the Granger Cases validated the power of the states to fix railroad rates, the limits of the authority of the states, the boundary between state and national authority, still had to be determined. The states that undertook to regulate railroad rates began by regulating the rates on all railroad traffic within their respective boundaries, that which came from or moved to another state as well as that which was intrastate; but in a series of decisions, beginning with *Wabash v. Illinois*<sup>2</sup> that was handed down in 1886, the Supreme Court has marked out with increasing definiteness the boundaries of state and national authority over railroads, not only as regards rates but also concerning facilities and services. These decisions which will be reviewed in Chapter VII have extended the regulatory power of the Federal Government over railroads to many matters that in 1886 were thought to be within the jurisdiction of the states.

The present rôle of the states in the regulation of carriers by rail or by waterways or airways is a minor one, the principal actor in the drama of regulation being the Federal Government. In the regulation of intrastate highway transportation, however, the states are exercising increasing authority. The automobile, motor-bus, and motor-truck have, however, made transportation on the roads interstate as well as local, and the volume and importance of interstate travel and traffic on the highways are becoming ever greater. There are now two major transportation facilities, the railroads and the highways, performing complementary and competitive services, partly intrastate and partly interstate in character.

The railroads were from the early decades of their development the main carriers of interstate traffic, and it was not long after the states began to legislate regarding the intrastate rates and services of the railroads that the Federal Government, in

<sup>1</sup> *Munn v. Illinois*, 94 U.S. 113; *Chicago, Burlington, & Quincy Railroad Co. v. Cutts*, 94 U.S. 155; and *Peik v. Chicago and Northwestern Railway Co.*, 94 U.S. 164, decided March 1, 1877.

<sup>2</sup> *Wabash, St. Louis and Pacific Railway Company v. People of the State of Illinois*, 118 U.S. 557.

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1887, adopted the Interstate Commerce Act, upon which by numerous later enactments Congress has erected the present comprehensive structure of railroad regulation. Congress acted less promptly regarding the regulation of interstate carriers by highways; but the rapid increase in interstate transportation upon the roads and the interlacing relations of rail and road carriers, as coördinated as well as competing agencies performing the major share of the country's transportation services, caused Congress in 1935 to provide for the regulation of interstate highway transportation.

The policy of the states and the United States towards inland waterways and towards coastwise and inland waterway transportation has in the main been to aid rather than to regulate. The purpose of the state and national governments has been to improve and extend inland waterways and to further their use, presumably with a view to establishing ultimately a national system of waterways that will assist in the economic development of the country and that will by competition with the railroads keep transportation charges in general upon a lower level than would otherwise prevail. The Federal Government is at present giving large aid to the improvement and extension of inland waterways as a part of a general program of utilizing the country's river resources for the generation of electric power, for irrigation of semi-arid agricultural areas, and for providing navigation channels.

Among the questions of inland waterways policy that have as yet been but very partially answered by Congress are what shall be the relationship of the inland waterways to other transportation facilities and agencies, what principles shall be carried out in the regulation of transportation by water, what place shall inland waterways have, along with the railroads, highways, and airways, in the national transportation system as a whole? Pending proposals for the regulation of carriers by water contain a partial answer to these questions which, however, can be fully answered only by adopting a policy of legislative and administrative regulation of transportation as a whole and of the several agencies thereof. The ultimate adoption of such a policy both by

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the states and by the National Government seems certain, but apparently the road yet to be traveled is not short.

The policy of the Federal and state governments towards air transportation has developed rapidly. The necessity for giving aid to the new and promising agency for the rapid carriage of mail and valuable packages and of such passengers as desire to travel with maximum speed is recognized, as is also the special need of making the service as reliable and safe as possible by careful government supervision of personnel, inspection of equipment, and regulation of the service. In all probability, public authority must ere long decide not only the conditions under which the service shall be performed but also who may engage in air transportation and what rates may be charged for services rendered. It is, moreover, highly important that the intercorporate relations and the financial management of the companies engaged in air transportation should be subject to public regulation. This has been but partly accomplished by legislation concerning air-mail transportation. The public interest in air transportation will unquestionably increase; while the relations of air carriers to each other and to the public and the integration of the services of carriers by air with the services of other carriers will develop problems of increasing importance whose solution will, it is to be hoped, be by national legislation for the general regulation of air transportation by the Interstate Commerce Commission.

One important agency or facility of transportation of increasing use, oil and gasoline pipe-lines, does not call for more than brief consideration in a discussion of government regulation. The regulation of pipe-lines by the Interstate Commerce Commission was provided for by the Hepburn Act of June 29, 1906. The pipe-lines are constructed by the large producers of oil or gasoline for the movement of their own products. To enable the smaller producers in and shippers from the fields from which the pipe-lines are constructed to obtain pipe-line transportation, the companies operating the lines are made common carriers and the rates charged for common-carrier services are subject to government regulation. The law is sound in principle, but it has

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not been of great importance, either in its effect upon the oil and gasoline industries or as regards its administrative enforcement, the Interstate Commerce Commission having been required to give the matter comparatively little time and attention. Should the oil industry, as seems probable, be brought under more comprehensive government control, the regulation of pipe-line transportation may have greater significance.

This introductory statement indicates that the field of government regulation of transportation is but partly occupied. The discussion that follows will also show that much yet needs to be done to improve and unify or coördinate the machinery of government regulation of interstate carriers other than those subject to the Interstate Commerce Act. A study of past experience, and of the principles that should be controlling in the government regulation of transportation, should be helpful in shaping the course of future action.

In reaching a decision as to the policy that may wisely be adopted for the United States, the first choice to make is between government regulation and government ownership and operation of the railroads and other transportation facilities, whether private capital and enterprise functioning under the oversight and administrative regulation of the Government should provide and operate transportation facilities or whether, or to what extent if at all, the facilities, agencies, and services should be those of the Government. It is with that subject that the following discussion begins.

## CHAPTER II

### GOVERNMENT REGULATION VERSUS GOVERNMENT OWNERSHIP AND OPERATION OF RAILROADS AND OTHER TRANSPORTATION FACILITIES IN THE UNITED STATES

TRANSPORTATION being a service of a public nature, a service upon which society individually and collectively is dependent, the capital employed in providing and operating transportation facilities is "vested with a public interest." If the capital be privately, that is, corporately, owned, the manner of its use and the amount of its earnings may be and, as experience has shown, should be regulated by the Government, such regulation, in the United States, being subject to the limitations that the Federal Constitution, especially in the Fifth and Fourteenth amendments, places upon the national and state governments. No person may be deprived of property "without due process of law," and the courts have held this to mean not only that private property may not be taken for public use without just compensation, but also that the Government may not lawfully destroy the value of property by depriving its owners of a fair return therefrom.

The first and fundamental question to be decided in discussing the relation of government to transportation in the United States is whether the capital required for its provision and performance should be privately owned and managed, subject to the regulation that state and national authority can exercise; or whether the public should supply the facilities and place their operation and management, in whole or in part, with the Government. In the case of railroad transportation, it is manifest that the Government might either occupy the field entirely or but partially, some railroads being owned and operated by the Government, others by corporations; while, as regards natural waterways and public highways, it would seem that their use by such carriers as now use them would be allowed to continue even if the Government should own and operate transportation facilities

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upon the roads, rivers, and lakes, and upon the ocean. The decision as to government ownership and operation would not need to be the same for the railroads as for other carriers.

Furthermore the decision to be reached as to the wisdom, or otherwise, of government ownership and operation of railroads in the United States or in any other country is not determined by the validity or invalidity of a general principle of universal application. In some countries the government regulates the railroads, in other countries it owns and operates them. The policy that should be adopted is a question of expediency, of what is best to be done under the conditions prevailing in the country making the decision. The question being considered in this chapter is which policy is the better for the United States to adhere to, public regulation of the railroads or their ownership and operation by the Government. The relation of the Government to other agencies of transportation will be discussed in other parts of the volume.

### CAUSES ACCOUNTING FOR GOVERNMENT OWNERSHIP AND OPERATION OF RAILROADS IN REPRESENTATIVE FOREIGN COUNTRIES

From what has just been stated, it follows that the experience of foreign countries in adopting and carrying out a policy of government ownership and operation of railroads, while instructive, can not be especially helpful in deciding what the policy of the United States should be. In a country such as India, for instance, private capital available for investment in railroads may be limited in amount, and corporate management and efficiency may be slightly developed; railroads may be urgently needed to stimulate production, prevent famine, and to make possible effective government administration throughout the country. The government in such a case must either seek to bring about the construction of railroads by non-resident or foreign capitalists—a policy which has its drawbacks and its dangers—or the government must engage in the construction and operation of railroads to the extent necessary to provide the country with adequate transportation services. It was found by experience that private capital did not meet India's need for railroads, and the Govern-



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ment has participated increasingly in the operation both of railroads it has constructed and of lines that have been taken over from private ownership.

The causes that have brought about the nationalization of railroads have varied with different countries, and in the case of each country several motives have influenced action. In the German states, especially Prussia, liberal government aid to the companies that built the first railroads led to the nationalization of some lines, and later military considerations as well as financial and social reasons caused the governments to participate increasingly in railroad construction and operation and finally to take over nearly all of the railroads. Following the World War the several state railroad systems were acquired by the Reich and a unified national system was formed.

Military reasons, quite as much as economic aims, caused Russia to build the Trans-Siberian Railway. China granted liberal concessions to foreign corporations to build railroads, and several foreign countries sought to use the concessions obtained by their respective countrymen to develop and strengthen "spheres of influence." When the present government was organized following the revolution of 1911, the several railroad systems were nationalized, the Government assuming the financial obligations of the former concessionaires. The main purpose of China was to eliminate foreign interference with her economic life and her political institutions; the assistance that the nationalization of the railroads might render in strengthening national unity was presumably not overlooked.

The Australian states, Canada, and South Africa aided private railroads and constructed government lines to hasten settlement, and to bring about the development of the economic resources of sections that would otherwise have remained isolated or but sparsely inhabited. Railroads built with government aid into the frontier section of a country are apt to prove unable, for a relatively long period, to yield an adequate return upon invested capital, and corporate insolvency has frequently led first to additional government assistance and ultimately to the nationalization of lines. The policy of government ownership and operation may thus be adopted not from choice but because of

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necessity. This is illustrated by the experience of Canada which has become largely involved in government ownership and operation of railroads.

The large gifts and grants given the Canadian Pacific helped build up what has become one of the strongest of railroads on the American Continent, but Canada's early aid of the Grand Trunk, her financing of the Intercolonial, her later grants to the Grand Trunk Pacific and to the Canadian Northern and other lesser roads, resulted not in bringing into existence profitable private railroads, but in the creation of railway systems that served the useful purpose of uniting first the Maritime Provinces and later the Western Prairie and Mountain Provinces with the "Canadas" (Quebec and Ontario) politically and economically, but which did not have traffic and earnings sufficient to make them financially self-sustaining. These struggling railroads thus aided by the Government were not equipped to meet the service demands that the World War made upon them and large additional financial assistance had to be given by the Government, with the result that the Government was practically obliged to take possession of and operate the several systems and assume their obligations. They were united into the Canadian National Railways which company includes 22,000 miles of line. The business depression that prevailed after 1929 has made the ownership and operation of this far-flung system of railroads, located in large part where traffic is light, a heavy financial burden to the Government. To remedy this costly situation Canada is seeking to reduce its burden by bringing about a greater coördination of the facilities and services of the country's two railroad systems, the government-owned Canadian National and the corporately owned Canadian Pacific, for the purpose of reducing unnecessary duplication of facilities and lessening the scope and expenses of intersystem competition.

### THE ARGUMENT FOR GOVERNMENT OWNERSHIP AND OPERATION OF RAILROADS IN THE UNITED STATES

A discussion of the policy of the Government towards transportation should set forth the argument for government owner-

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ship of railroads by the United States as well as those for private ownership under government regulation. It is a controversial question, both sides of which should be presented. The affirmative side may well speak first, and no one is more entitled to an attentive hearing than is the former Coördinator of Transportation. In the report which the Coördinator, Mr. Joseph B. Eastman, made to the Interstate Commerce Commission in January, 1934, upon the "Regulation of Railroads"<sup>1</sup> he states the reasons why, in his opinion, "Theoretically and logically public ownership and operation [of the railroads] meets the known ills of the present situation better than any other remedy."

After referring to the "variety of underlying motives" that have brought about government ownership and operation of railroads in countries other than the United States, Mr. Eastman states "it is idle to measure the results by the test of earnings." Mr. Walker D. Hines, who was Director-General of Railroads at the end of the period of wartime Federal control of railroads and who believed in private ownership and operation, is quoted as stating in his *War History of American Railroads* that the experience of the United States during "Federal control does not constitute a sound argument either for or against permanent peacetime government ownership and operation." Moreover, it is argued by Mr. Eastman that what has taken place in Canada does not indicate that private ownership and operation is desirable. Much of the mileage in the present Canadian National system having "been recklessly and extravagantly constructed in advance of the country's needs," the Government was forced to take over the roads thus built; and, "It is conceded that these lines have been operated more efficiently and have given better service since than before public acquisition." The Royal Commission appointed in 1931 did "not recommend that the Canadian National system be returned to private ownership and operation," but suggested "changes in the plan and methods of administering the system" to correct "the evils found to exist."

Having thus referred to the experience of the United States in operating the railroads during Federal control and of Canada

<sup>1</sup> Senate Document No. 119, 73rd Congress, 2nd Session. See pages 13-21 and 30 for discussion of "Public Ownership and Operation."

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since she acquired the lines comprised in her National Railway system, and having enumerated some of the railroad ills that require remedy, Mr. Eastman states:

Public ownership and operation would clearly go further than any other change to abate the railroad ills. . . . Public credit would take the place of crippled private credit. Management and operation of the industry would be wholly united. Public regulation would largely merge with management and operation. Financial domination would cease. The important questions are whether other ills would take the place of those abated, and how serious they would be; whether public opinion is ready for so radical a change; and how difficult and perilous the taking over of the properties would now be.

Among the ills that might take the place of those abated is "political interference in management" and this is "the danger most emphasized by the critics of public ownership and operation." This interference may take one or more of four forms:

(1) extension of political patronage or the spoils system into railroad employment, (2) influence of special groups or of favored localities upon the fixing of railroad rates, (3) adoption of construction programs to favor localities or to lighten social relief burdens, (4) political interference with reference to labor relations, working conditions, and wages. Can these dangers be foreseen and guarded against? Mr. Eastman's answer to this question is optimistic and is as follows:

That these are real dangers has been shown by experience in other countries. . . . It is clear that the railroads cannot be efficiently operated if they are to become tools of political parties. If the issue is made clear, the country will register that opinion emphatically. The workers themselves can be a most important and effective safeguard, if they are allowed to organize freely, for it is far from their wish to be in jeopardy from political changes in government.<sup>2</sup>

<sup>2</sup> Would organized labor not only secure permanency of tenure of employment, as suggested, but also exert a strong influence upon legislation affecting government policy and upon administrative action carrying out that policy? Mr. Eastman states that the danger of political "interference with labor relations is real," but he thinks that, as civil service employees, railway laborers might be under government restrictions as to political activities, and thus be less influential politically than at present.

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Other effective safeguards are practicable. The tendency in countries which have public ownership and operation is now definitely to separate the railroads from ordinary governmental activities and make them autonomous, nonpolitical enterprises. The best way of doing this is to vest their ownership in a corporation of which the government is the stockholder, to be administered as an independent business enterprise. Control should be by a board of trustees with a definite tenure of office and removable only for cause. The act creating the corporation should make it a positive duty of the trustees to operate the property on a self-sustaining basis so far as possible, and without regard to political considerations. It should be made a penal offense for the trustees or any of their subordinates, to appoint, remove, or retain officers or employees at the solicitation of any officer of the government or political party organization, and for any such officer to solicit action or to interfere in any way with the disciplining of employees. In addition there should be an advisory council, made up of members selected by representative business and other groups in the community, authorized to consult with the trustees upon policies of management, and free to procure all desired information in regard to the conduct of the corporation.

The additional suggestion is made that "if further protection against political interference is desired, it is possible to have the trustees appointed by a nonpolitical committee," as was provided for by the Act of Parliament that established the London Passenger Transportation Board which since July, 1933, has had control over all passenger transportation services in London and the surrounding suburban area. Mr. Eastman's apprehension as to the possible political interference by Congress with the government management of the railroads is lessened by the fact that, while Congress could have legislated directly concerning rate-making and other matters that have been intrusted to the Interstate Commerce Commission, it has not done so, because of the opposition within and without Congress to such action.<sup>3</sup> Moreover, the Commission would be continued as a regulatory body with jurisdiction "over individual rates or groups of rates,"

<sup>3</sup> The Hoch-Smith Resolution of 1925 calling upon the Commission to fix rates on agricultural products and live stock as low as they could lawfully be made, thus shifting a larger share of the total payment for railroad transportation to other kinds of shipment, came near to being direct legislative action regarding railroad rates.

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fixed by the government railroad corporation which should also be required to secure from the Commission a certificate of public convenience and necessity authorizing the construction of new lines or of extensions. This would in effect subordinate, as regards important functions, the agency created to operate the railroads to the higher authority of another government body.

The Coördinator of Transportation manifests his fairness of judgment in considering the problem of efficient administration of the railroads. He raises the question "whether the railroads of the country could be effectively and efficiently managed as a single unit," and states that, "It is difficult for the general administrative or supervisory force to keep in touch with the employees and still more difficult to keep in touch with the patrons, and these difficulties multiply in geometrical ratio as the size of the system increases." After referring briefly to the administrative difficulties encountered by the Southern Pacific, which operates in the largest territory served by any of the railroads in the United States, and the Pennsylvania Railroad which handles the largest volume of traffic, and after alluding to the fact that the consolidated railroad systems in Great Britain "have for some time been giving this matter close attention," Mr. Eastman ventures the opinion that: "It is probable that the solution will be found in a staff and line form of organization, under which general policies and planning will be laid down by a staff and the execution will be left to local officers with a large measure of autonomy and jurisdiction over comparatively small units or areas."

However, he frankly states that "it is quite too much to say that the answer to this question has yet been found," and that, "If public ownership and operation were established overnight, there would probably be a long period of trial and adjustment before the best form of organization could be devised and made effective. A machine working smoothly at the outset could hardly be expected."

Among the effects of public ownership and operation would be the elimination of competition among the railroads, and, although "many doubt that initiative and enterprise can be maintained without it," and while the subject of substitute incentives

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“has not been adequately explored, enough is known so that there need be no great fear, in this respect, of the elimination of competition.” The railroad industry is competitive; the telephone and electric industries are not; but “will it be said that there has been less initiative and enterprise” in the latter industries?

After thus presenting the argument for the affirmative, as here summarized, the Coördinator does not recommend government acquisition of railroads in the United States at the present time. Action should be postponed for two reasons: one is that, “There is no aggressive sentiment in favor of public ownership and operation. . . . The man in the street appears to be indifferent . . . labor is lukewarm . . . there is no effective support in public opinion.” The other and “perhaps the strongest objection to public ownership and operation may be found in the present economic condition of the nation. It is heavily burdened with debt, and the burden is increasing.” The substitution of government securities for railroad securities at such an appraisal of values as would doubtless be made would “increase the fixed charges which [railroad] operations must bear inconsistent even with the future earning capacity of the properties, having in mind especially the competition from other transportation agencies which they now face and other changes in economic conditions . . . the immediate burden upon public finances might be great.” In other words, it would be best for the public to let private capital carry the railroads through to the more prosperous days that are hoped for, and for the Government to postpone the purchase and operation of the railroads until its finances are out of the mists of uncertainty and are in a position to stand the strain of increased indebtedness and possibly of enlarged current liabilities.

### THE ARGUMENT AGAINST GOVERNMENT OWNERSHIP AND OPERATION OF RAILROADS IN THE UNITED STATES

Problems of public policy, unfortunately, cannot be solved by means of mathematical formulae. Decisions as to public questions have to be reached by the exercise of judgment as to what it is wise to do in view of what has taken place and of what the present

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situation presents. This generalization applies with special force to the question whether the past and present policy of corporate development and management of railroads in the United States should be changed for public ownership and operation. A judgment as to what should be done should be based upon a knowledge of what corporate enterprise, under government regulation, has done and is doing in providing railroad transportation; and upon an understanding of the political system in the United States and of the functioning of the Federal Government. In reaching a decision by the exercise of judgment, as definite answers as possible must be made to several questions. The answers that each individual makes to these questions will determine whether his decision as to government ownership and operation of railroads in the United States is in the affirmative or in the negative.

In the argument, above summarized, in favor of public ownership and operation, special consideration was given to "political interference in management," and to the means by which that might be avoided. It will probably be agreed by every one that the first and most fundamental question upon which a judgment must be reached is whether a non-political administration of railroads by the United States would be possible.

Until recently, at least, the Government's largest business enterprise has been the management of the postal service, and it has become customary to appoint as Postmaster-General the chief political leader or strategist of the party in power. Presidential appointments of postmasters are controlled by partizan politics; members of Congress of both parties use the mails, free of postage, for personal and political propaganda; the investment of the Government in post offices is not considered in reporting the cost of mail service; and post-office buildings are not infrequently erected where political pressure is great or where political results will follow. If, as may be admitted, the political administration of the Post Office has not resulted in a poor service, it has been because the task is a relatively easy one to perform. To operate and administer the railroads of the country upon a businesslike and self-supporting basis would be far more difficult than to conduct the postal service as it is now managed and with congressional appropriations to meet annual deficits.



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The policy of Congress regarding transportation by water does not encourage one to expect a nonpolitical and businesslike administration of railroads owned and operated by the Government. Large expenditures of public funds have been made upon inland waterways to create and maintain navigable channels, when only a small volume of traffic upon the waterways was probable. Those using the waterways created at public expense, whether as common or private carriers, have been charged nothing for the use of the facility provided by the Government; and at the present time a corporation, whose stock is owned by the United States Government and whose invested capital is provided by the Government without charges for interest or taxes, is engaged in transportation upon the Mississippi, Missouri, and Warrior rivers and upon the canal and river waterway across Illinois. The National Waterways Corporation charges rates 20 per cent less than competing railroads are allowed to charge, and has the advantage over competing carriers by water afforded by its freedom from taxes, from the payment of interest upon capital, and from obtaining a profit with which to reward its stockholders (the public) for engaging in the business enterprise. The avowed purpose of Congress in creating and supporting the National Waterways Corporation has been, first, to demonstrate that private enterprise can successfully develop transportation upon inland waterways and then, second, to sell out its equipment and business to one or more private corporate common carriers; but the conditions of sale embodied in the Inland Waterways Corporation Act of June 7, 1924, as amended by the Act of May 29, 1928, will have to be changed before the Government can find a buyer, if it should desire to retire from business.

The question raised by the statement just made is not whether the Government should or should not improve inland waterways and seek to develop the use of the waterways thus improved and created; the question is whether businesslike methods have been followed and whether political interference has influenced legislation and public policy. Government aid and regulation of transportation by water will be discussed in Chapters XVI, XVII, XVIII and XIX.

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In deciding for or against public ownership and operation of railroads one must consider whether the Government could operate the railroads as economically and efficiently as corporations can. The magnitude of the task of administering all the railroads in the United States as a single system is manifest. As the Coördinator of Transportation said, "This is a most serious question." The wisdom of consolidating the railroads of the United States into as few as five to seven corporate systems, as has been urged by some prominent authorities, seems doubtful, because of the uncertainty as to the possibility of administering such large systems economically and effectively. If there is doubt as to the ability of corporations to manage such systems satisfactorily, must there not be greater question as to capacity of the Government to administer efficiently all the railroads of the country as a single system? The Government is not a business organization; and it is not to be expected that the agencies it creates for the conduct of business activities can have the initiative, the flexibility of action, the personal incentive of officials, that characterize well-managed business corporations. Government regulation of railroads and other agencies, as experience has shown, is needed in the United States; but when the public has laid down the rules of the game and has provided an umpire to carry out the rules, the game can be played more efficiently and successfully by corporations than by government departments or bureaus.

Would the capital costs or fixed charges of American railroads be less under government than under corporate ownership and operation? This question is usually answered in the affirmative. A government such as that of the United States has been, can borrow money or secure capital funds at lower interest rates than private corporations can. Government credit has been better than corporate credit. If in the future the Government is able to obtain funds at lower rates than well-managed corporations can, it will be because people have undiminished faith in the Government's ability to meet its obligations promptly and fully. What the future of government credit will be cannot be foretold with certainty. As this is being written, the public debt is rapidly mounting; the Government is borrowing large sums to enable it

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to make expenditures far in excess of its present or its near-future revenues from taxation. A national debt of 35 billion dollars or more is in prospect. If to this were added the 20 to 25 billion dollars of government bonds that would need to be issued to purchase the railroads, would the Government's credit be higher than that of well-managed private corporations functioning under government regulation? Government credit, it is obvious, will be affected by other factors than the amount of the public debt, especially by the monetary policy that is followed; but, assuming that the other factors are favorable, would the United States, with a debt of 55 to 60 billions of dollars and an annual interest obligation of two billion dollars, having a sinking-fund requirement of another half billion, be able to borrow funds at a low interest rate? Possibly it might, if its investment in the railroads could be made self-supporting and self-liquidating, and if the railroad property could, as at present, pay its proportionate share of the taxes upon property in general. Could and would this policy be followed in the operation of the government-owned railroads?

In theory, at least, it would be possible to make reductions in several items of operating expenses. Government ownership would presumably mean complete coördination of railroad facilities. Empty-car mileage could be reduced. Unnecessary duplication of facilities and services could be avoided. Less investment in equipment might be required. The expenses of competition would be eliminated. By substituting one government corporation for the present large number of railroad corporations, there might be a reduction in the number of salaried officials, and intercorporate accounting and other interline expenses could be done away with. If the Government should be able to administer the consolidated, nation-wide railroad system efficiently, operating expenses might be reduced, unless the economies effected were offset by higher labor costs under government than under corporate management.

The Government's labor policy would, quite surely, be an important test of its success or failure in reducing the cost of operating the railroads. Wages include nearly two-thirds of railroad operating expenses. In 1920, 63.2 per cent of such ex-

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penses was for wages, which required 59.3 per cent of the total operating income. In 1929, wages comprised 64.2 per cent of operating expenses and 46.1 per cent of that year's large operating revenues. In 1933, when the railroads had cut down their operating expenses as much as possible, wages included 61 per cent of the expenses, and 45.3 per cent of the revenues from operation. In 1936, wages comprised 63 per cent of operating expenses and 45.6 per cent of operating revenues. In 1934, railroad wages were restored to the basic scale from which they were lowered by 10 per cent in 1932; and in August and October 1937 wages were substantially increased. Moreover, the congressional legislation of 1934, 1935 and 1937 concerning the retirement and pensioning of railroad employees has increased railroad labor costs.

The substitution of government for private ownership and operation of the railroads would quite certainly increase the number of employees; and it is also probable that the hours of labor in government service would tend to be lower than in private employment, while wages would presumably be on a somewhat higher scale, even if political influences did not determine hours of service and wages. The Government would be confronted with a difficult administrative task in the operation of the railroads in the United States, and the Government is not a business organization. Railroad operating expenses would in all probability be higher under government management.

Presumably those desiring public ownership and operation of railroads in the United States would expect the Government to be able to make the rates for services lower than those now charged by the railroads, although these rates are subject to government regulation. The rates fixed by the Government for its services would necessarily depend upon the financial policy followed in its management of the railroads. If it should be the policy of the Government to make the railroads self-supporting, as that term is narrowly defined, the revenues would need to be sufficient to cover not only current operating and maintenance expenses, but also to meet the annual interest charges on its investment of 20 to 25 billion dollars. The net annual income from

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the public operation of the railroads would thus need to be at least 750 million dollars to meet fixed charges.

If the gross revenues from government operation were sufficient only to cover operating and maintenance expenses and interest charges, the railroads could hardly be considered to be on a self-supporting basis. At least the government railroads would not be sustaining as much as the corporately owned railroads are supporting. In order to keep abreast of technical improvements and to make facilities and services progressively better much more than annual "maintenance" is necessary. Large sums must be spent each year for new and better facilities, and these large requirements for keeping technically abreast of the times must come, or should come, from earnings and not from borrowed funds that add to fixed charges. Technical improvements are now being made by the railroads with increasing frequency; and, as Mr. Eastman has stated, "the known opportunities for such improvements are large, and many now unknown will surely develop."<sup>4</sup> The amount being spent by the railroads for such betterments cannot be stated, but from 1920 to the end of 1932, to quote Mr. Eastman again, "the railroads' investment in new lines, extension, and additions and betterments, less retirements, amounted to \$6,309,117,000."<sup>5</sup> This large sum came mainly from earnings. "Between 1920 and 1933, stock was increased by \$1,184,000,000 and funded debt by \$1,375,000,000, or a total of \$2,559,000,000."<sup>6</sup> As better times are returning net earnings are again becoming the source of funds for betterments; although, in the case of many railroads, outlays for deferred maintenance have had a prior claim on earnings.

Private enterprises, including railroads, are considered to be self-supporting only after they have met all current operating and capital costs, including, among other items, taxes levied by the local, state, and Federal authorities. In 1926, the taxes of \$388,992,856 included 6.09 per cent of the gross operating rev-

<sup>4</sup> Regulation of Railroads, Senate Document No. 119, 73rd Congress, 2nd Session, p. 3.

<sup>5</sup> Regulation of Transportation Agencies, Senate Document No. 152, 73rd Congress, 2nd Session, p. 2.

<sup>6</sup> From an address by Joseph B. Eastman, Oct. 10, 1934.

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enues. In 1936, the total taxes, including therein the railroad retirement and social security unemployment taxes paid by the railroads in the United States, amounted to 320 million dollars which was nearly 8 per cent of their gross operating revenues. Most of the taxes are paid to local and state governments. Would a United States Railroad Corporation be required by Congress to pay taxes equal in amount to those that are paid by private railroads?

What should be the policy of the Government regarding the amortization of the debt incurred in purchasing the railroads? At present railroad finances are regulated by the Interstate Commerce Commission, insofar as that is accomplished by requiring the Commission's approval of the issue of securities. In discussing the subject of retiring railroad debts the Commission states, in its Annual Report for 1933, that:

It has been the policy of railway companies to provide for their financial requirements largely through the issue of long-term bonds which at maturity are refunded. . . . The funded debt is constantly increasing as their investment in railway properties is increased. . . . The expense of refunding in the manner heretofore usually followed is considerable. . . . The strain caused by heavy fixed charges in such a time as this [a period of business depression when railroad revenues are greatly reduced and the refunding of matured bonds is difficult] is detrimental to the service furnished the public. . . . We are giving consideration to methods of bringing about a reversal of the present trend in railway financing. We believe that the desired result can be obtained, in part at least, through the provision of sinking funds to be set up by the railway companies out of net income for the purpose of retiring a part of their funded debt before maturity.

The Commission also stated "that an accumulating sinking fund of one half of one per cent per annum, providing for calling bonds at par, would retire the present debt if in effect for approximately 52 years," and the announcement was made that, "If such funds are not voluntarily established by the railway companies, their establishment may be required as a condition to our authorization of further bond issues under the provisions of Section 20a of the Interstate Commerce Act."

If the policy of debt amortization is one that the Government should require railway companies to adopt—and the Commis-

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sion's proposal seems wise—should the same policy be followed in the public administration of the railroads? If it were followed, and a railway debt of 20 to 25 billions of dollars were amortized at the rate of one half of one per cent per annum, the consequent yearly demand upon net earnings would be from 100 to 125 million dollars.

A summary and application of the foregoing details will indicate their significance. If the railroads in the United States, when owned and operated by the Government, were so managed as to be self-supporting as the corporately-owned railroads have been, the gross operating revenues would have to be sufficient to meet the expenses for operation and maintenance, to cover the necessary outlays for betterments and technical improvements, which may be conservatively estimated as requiring 350 million dollars annually, to assure the payment of interest charges of not less than 750 million dollars per annum at the beginning, and to provide for taxes that should presumably total about 300 million dollars annually on the average.<sup>7</sup> If in addition to being fully self-supporting the government railroads were to provide for the ultimate liquidation of the government investment in them, their net revenues would have to meet an additional annual demand of 100 to 125 million dollars. In other words the government-owned railroads would require gross revenues that would cover operating and maintenance expenses and yield an additional annual net revenue of not less than \$1,500,000,000.

The total operating revenues of Class I railroads in the United States in 1929 amounted to \$6,279,520,544. In 1933, they had fallen to \$3,055,448,888. For the year 1936, they rose to \$4,053,000,000. As the railroads are being obliged to share travel and traffic increasingly with other carriers, especially with those on the highways, the gross revenues of the railroads can hardly reach the totals of former years. Future operating revenues of five or five and a half billion dollars would seem large; they cannot be expected to go higher, at least for some years to come.

In 1936, the operating expenses of Class I railroads were

<sup>7</sup> The taxes paid by the railroads in the United States during the 10 years ending with 1933—the last three years being “lean” years—amounted to about \$3,427,000,000.

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72.6 per cent of the operating revenue. In 1931 and 1932, the ratio was nearly 77 per cent. The restoration and increase of the 1931 wages of railway employees, the additional outlay for labor made mandatory by the Retirement and Pension Act, by unemployment insurance, and by the unavoidable increase in expenditures because of deferred maintenance, will keep the operating ratio of the railroads relatively high for the next few years at least. Moreover, if or when government operation took the place of corporate management, the operating ratio would presumably be raised by an increase in the number of employees and by the wage policy that would go with government employment.

In order to have net earnings of \$1,500,000,000 above operating and maintenance expenses, such expenses would have to be kept below 70 per cent of the gross operating revenues, and there is no prospect that the operating ratio could be kept that low. Otherwise stated, there is nothing to indicate that the Government would be able to operate the railroads in the United States upon a self-sustaining and self-liquidating basis. Indeed, it does not seem that the railroads could be self-supporting under government management, the term self-supporting being defined to mean that the railroad revenues would be sufficient to cover operating and maintenance expenses, essential outlays for betterments, interest on investment, and normal taxes upon the value of the railway property.

### PROBLEMS INCIDENT TO GOVERNMENT OWNERSHIP AND OPERATION OF THE RAILROADS

If the Government were to acquire and operate the railroads in the United States, what should be the relation of the railroads to transportation and carriers upon the coastal and inland waterways and upon the highways? At present there is but partial public regulation of carriers by water. The several states are rapidly extending their regulation of the use of their highways but their authority is limited to intrastate transportation, and the Federal Government has not yet begun the regulation of interstate highway transportation. Presumably the Government,



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as the owner and operator of the railroads, would not permit carriers by road and waterways to continue their present uncontrolled competitive struggle with the railroads for passenger and freight traffic. If the Government left the field of transportation by rail and water to private carriers, the services and charges of such carriers would quite certainly be fully regulated by the Government.

By the Panama Canal Act of 1912 the railroads, which at that time were operating several lines of vessels coastwise and on the Great Lakes, were prohibited from owning or operating vessels with which they did or might compete, the Interstate Commerce Commission, however, being given authority to permit the railway companies to operate vessels, if competition would not thereby be lessened and if such operation would be in the public interest. The Commission permitted the New Haven Railroad Company to continue its ownership of the New England Steamship Line and also allowed the Southern Pacific Railroad Company to retain possession of the Morgan Line which it operates between New York and New Orleans, Galveston, and Houston. The railroads were required to dispose of the other vessel lines that they were operating coastwise and on the Great Lakes.

Presumably the government ownership of the railroads would be accompanied by the full coördination of the services of the unified railroad system with the services of the coastwise and inland waterway carriers, the private carriers by water being changed from unrestrained competitors to regulated competitors and complements of the railroad. Would it, however, be the policy of the Government, as owner and operator of the railroads, to discontinue its present river and canal transportation services, and leave the field of water transportation entirely to regulated private enterprise; or would the Government, in order to cause the inland waterways to be more largely used, operate over joint rail and water routes, thus supplementing its rail services and effecting a greater coördination and unification of rail and water transportation? Without venturing to predict what policy might be adopted, one may feel certain that private carriers would not engage in transportation upon the inland waterways in competition with the Government, unless the business methods of the

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Government were such as to place public and private enterprise upon a common footing. To do this, the Government would have to adopt methods different from those that it has regularly followed.

Private railroad companies are engaging more and more in transportation upon the highways. Through subsidiaries they are operating bus lines; they have begun the use of trucks, through controlled companies or through contractors, to collect and deliver package freight in terminal areas, and to perform local, interstation freight services formerly and still ordinarily performed by local freight trains. What has already taken place in Great Britain and what has been started in this country indicates a rapid extension of street and highway transportation by the railroad companies, and this greater coördination of the facilities and services of rail and road transportation is in the public interest. Does it follow from this that government ownership and operation of the railroads would involve a large participation by the Government in street and highway transportation? Would the Government supplement its railroad passenger service by operating bus lines? Would it use trucks for local, interstation freight? Would it operate trucks to deliver freight from rail-head centers to off-line points and to bring freight from such points to the rail-head for further carriage by rail, thus providing complete rail and road transportation for the people and industries in each section of the country served by the railroads? This is the goal towards which the British railroad companies are moving.

The extent to which the United States Government, as owner and operator of the railroads, would engage in highway transportation would presumably be determined as the Government proceeded with the development of its railroad services and with its plans for coördinating transportation facilities and agencies. It is, however, manifest that if the Government were to take over the operation of the railroads it could not limit its services to rail transportation; it would necessarily be obliged to engage increasingly in highway transportation either directly or by contracting with private carriers on a large scale. The result would be that the Government or its agents would be competing by bus

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and truck with other highway carriers, common, contract, and private.

### GENERAL CONCLUSIONS

An adequate and efficiently managed railroad system is essential to the future welfare of the people of the United States. That prerequisite of economic and social well-being has thus far been provided by private enterprise subject to public regulation. If the foregoing analysis is correct as to facts and conclusions, it will be best for the United States to adhere to the policy of government regulation of railroads. There are, however, not a few who think that public ownership and operation will soon be made necessary by the inability of the railway companies to solve the financial difficulties that have been brought upon them by a prolonged and severe business depression, and by a concurrent rapid increase in the competition of highway carriers for traffic that formerly moved by rail.

The present financial problems are real and difficult. Their successful solution by the railway companies will depend upon a number of as yet undetermined factors—upon a general revival of business, which may presumably be depended upon to follow former cyclical trends; upon the avoidance by Congress of the enactment of labor or other legislation that will unduly burden the railroads; upon the early action by Congress applying to interstate transportation by air and water the general principles of regulation that have long been applied to railroads and latterly to highway carriers; upon the avoidance of currency inflation by legislative or executive action; upon extending the time within which some of the government loans to the railroads may be repaid, which can be done without loss to the Government; and, in general, upon the development of a general policy of public aid and regulation of transportation that will place the several agencies upon a common footing in relation to the Government, a policy that will assign and assure to each agency its appropriate place in a coördinated transportation system. The foregoing statement is a broad generalization of what needs to be done to enable the railway companies successfully to meet their present and near-future financial obligations and to secure

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from private sources the funds needed for the future development of railroad transportation. The substitution of government ownership and operation for public regulation of the railroads is not necessary and may be avoided by providing for the adequate and efficient regulation of transportation as a whole. What is involved in regulating transportation adequately and efficiently is discussed in the following chapters.

If government ownership and operation of the railroads in the United States is not necessary, it may well be avoided. The scope of the Federal Government's activities is expanding. The Government has a large task to perform if it confines itself strictly to the requisite regulation of business practices; and it should be the aim of the Government to accomplish that task with as little limitation as possible of the sphere of private business initiative and activity. The Corporation, which is a creature of government, has need of regulation when it engages in services that are of a public nature or that are vested with a public interest; but, in this country at least, the well-managed corporation is a more efficient business agency than the Government can hope to be. Government is primarily a political organization for the exercise of political functions. Especially is this true of government in the United States, where state and Federal constitutions place large emphasis upon legislative powers. Experience has shown that our legislatures, state and Federal, act slowly, and their actions not infrequently are influenced or determined by the pressure of organized blocs or of partizan political forces. For the present at least it will be well to endeavor to regulate transportation and not to undertake the government ownership and operation of the railroads.

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## CHAPTER III

### THE OBJECTIVES OF GOVERNMENT REGULATION OF TRANSPORTATION

ANY decision as to policy and procedure in the government regulation of transportation must necessarily take into consideration and be influenced by the objectives sought to be attained. In many respects the Government's aims in regulating the corporate or private agencies that provide the facilities and perform the services of transportation must be the same as those sought to be accomplished by public ownership and operation. The general objective of government regulation of transportation will naturally be the adoption and administration of such measures or policies as will result in the public receiving as adequate and efficient services as are obtainable by individual and corporate enterprise functioning under government oversight and regulation. For reasons there stated, the conclusion was reached in the preceding chapter that a better and less expensive railroad service in the United States can be secured by regulated private enterprise than by government ownership and operation. The relation that the Government should have to transportation by road and by water will be considered in later parts of this volume. This chapter is concerned with the objectives of government regulation of transportation as a whole—with carriers and services by rail, road, water, and air.

#### ADEQUACY OF FACILITIES

The first and most fundamentally important objective of government regulation of transportation must be facilities and services adequate to meet the needs of the public. The public needs are those economic in character that pertain to the conduct of business, and those of social significance, adequacy of transporta-

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tion facilities and services being requisite to social well-being and progress. Government regulation is concerned not merely with saying what may or may not be done by private enterprise; the Government must so arrange the stage that each acting carrier may perform his part well and may have the opportunity and incentive to improve his performance and thus to increase his contribution to the success of the drama that is being enacted. The primary purpose of public regulation is not to check private enterprise, but to enable it to accomplish the best attainable results in providing facilities and services.

That adequacy of facilities and services is the first objective of government regulation of transportation is well illustrated by the Pennsylvania Public Service Company Law of 1913. Article II of the statute sets forth the "Duties and Liabilities of Public Service Companies" and the first paragraph of Section One of the Article declares that:

It shall be the duty of every public service company—(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission.

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The second paragraph of the Article stipulates that the charges for services must be reasonable while the third paragraph requires public service companies, "To make all such repairs, changes, alterations, and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employees and the public."

In the early years of the regulation of transportation by the states and the Federal Government, which began with the regulation of the railroads, legislatures and commissions were concerned especially with the correction and prevention of abuses that had developed; but when the purposes of punitive measures, had been largely accomplished, the more constructive objective of seeking to assure adequacy of facilities and services came to be emphasized in public regulation. Thus regulation became more positive and less negative in aim.

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## EFFICIENCY AND ECONOMY OF SERVICE

It was logical that, in the administrative regulation of transportation, measures should be taken not only to assure adequacy of facilities and service but also to bring about increased efficiency and economy in the performance of the several classes of service. The Government and the regulated carriers here have a common aim. The carriers, unless prevented by adverse financial and business conditions, will, if wisely managed, seek to improve their facilities and to adopt more economical methods in order to reduce costs of service and to increase net earnings. The initiative for increasing efficiency and economy of service will be with the carriers and is strengthened by associated action. The railroad companies while working individually to improve their service and reduce costs, have been greatly aided by the American Railway Association whose membership included all the railroad companies and whose activities were so organized as to deal constructively with the technical problems of improving locomotives and cars, with operating methods, car service, and interline relations. Because of the beneficial results of associated action the railroad companies, in 1934, provided for greater coöperation by consolidating the American Railway Association and the Association of Railway Executives into the Association of American Railroads, which organization, functioning with more authority than its predecessors possessed, concerns itself with improvements in the facilities and services of the railroads and with effecting economies by bringing about greater coördination and less unnecessary duplication of effort on the part of the several railroad systems.

From 1920 to the present, the promotion of efficiency and economy of service has been an increasingly definite aim of Federal regulation of railroads. Prior to 1920 connecting railroad companies were permitted and required to form through routes and publish joint tariffs, but they were prohibited from pooling traffic, and if competing carriers consolidated they violated the antitrust laws. The experience of the Government in operating the railroads for 26 months led to several changes in its policy of public regulation when the railroads were returned to their



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owners. The Act of 1920 permitted railway pooling subject to the approval of the Interstate Commerce Commission and it sought to further the grouping of railroads into a limited number of systems, the grouping to be in accordance with a plan to be promulgated by the Commission.

Less has resulted than was expected from the change in policy made by the Act of 1920, but the purpose of furthering efficiency and economy in the railroad service by government regulation has been adhered to. The Interstate Commerce Commission, having been directed by the Act of 1920 to give consideration in making or adjusting rates "to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation," gave "attention to plans for improving the efficiency of the national transportation system by a more effective coördination of the various transportation agencies."<sup>1</sup> The Commission has a bureau of service that was established in April, 1920, especially to deal with car-service problems due to car shortage; but as car shortage has not recurred since 1923, the Bureau has devoted itself increasingly to "studies and activities concerning efficiency and economy of operation."<sup>2</sup> As stated in the Commission's Annual Report for 1933, the Bureau of Service, at the request of the Coördinator of Transportation was "participating in the investigation of matters pertaining to labor relations, maintenance of equipment, consolidation of shops, economy of operation, and accessorial services which carriers perform."

Further emphasis was placed upon efficiency and economy of service as an objective of government regulation of railroads by the Emergency Railroad Transportation Act, approved June 16, 1933. This act created the office of Coördinator of Transportation and defined his duties. It also provided for the regulation of railroad holding companies; but permitted a non-carrier company to acquire control of two or more railroad companies through

<sup>1</sup> Thirty-sixth Annual Report of the Interstate Commerce Commission, Dec. 1, 1922, p. 25.

<sup>2</sup> Fortieth Annual Report of the Interstate Commerce Commission, Dec. 1, 1926, p. 64.

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stock ownership subject to the approval and authorization of the Interstate Commerce Commission, the non-carrier company becoming subject to the regulation of the Commission. By adopting this policy regarding the regulation of railroad holding companies Congress made it possible for two or more railroad companies to be given unified control and to secure the economies in operation and improvements that may result therefrom.

As is stated in the Act, the purpose of Congress in adopting the Transportation Act of 1933 and in creating temporarily the office of Coördinator of Transportation was "to encourage and promote or regulate action on the part of carriers . . . subject to the Interstate Commerce Commission . . . which will avoid unnecessary duplication of services and facilities . . . control allowances, accessorial services and charges therefor . . . avoid other wastes . . . promote financial reorganization of the carriers . . . and provide for the immediate study of other means of improving conditions surrounding other means of transportation in all its forms." Under the able leadership of the Coördinator of Transportation and with the coöperation of the carriers the Government gave attention to reducing the costs and increasing the efficiency of railroad transportation.

### COÖPERATION AND COÖRDINATION OF TRANSPORTATION AGENCIES

The objective sought by the Government in permitting railroad pooling, in facilitating railroad consolidations, and in seeking, by the Emergency Railroad Transportation Act of 1933, to avoid duplication of facilities and services and to improve operating methods has been, in part at least, not only to assist in bringing about greater efficiency and economy in the services rendered by the several railroad companies, but also to facilitate and further the coöperation and coördination, first of all, of the railroads with each other, and then also of all the agencies and facilities of transportation—those by rail, road, water, and air—into a definitely coördinated general system of transportation. The attainment of this goal will in time become the major objective of government regulation of transportation; but until the several kinds

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of carriers, including those by air and water, as well as those by rail and highway, are placed upon a common footing as regards regulation, the goal of a coördinated national or general system of transportation cannot be reached.

The earnest efforts of the Government and of the associated railroad companies to further the coöperation of competing railroads with each other give promise of being effective. When the business of interstate transportation upon the waterways has been stabilized and put upon an orderly basis by adequate Federal regulation, it will be possible for competing carriers upon the waterways to coöperate and thus to coördinate their services. Likewise Federal regulation of highway carriers will make possible their greater coöperation with each other. Coördination of services and the substitution of regulated competition for unrestrained and often destructive rivalry within each field of transportation will pave the way for bringing the several agencies of rail, road, and waterway transportation into an integrated system, each constituent part of which will perform the services it can render most efficiently and economically.

The coördination of facilities and services within each of the several fields of transportation and the ultimate integration of all agencies of transportation into an organized system would involve the regulation and limitation, but not the elimination, of competition and rivalry in service. The several railroad systems would seek to attract traffic by improvements in service, and no railroad system could free itself from the effects of the competition of the industries and markets it serves with the industries and markets served by other railroads. Moreover, if the several agencies of transportation were integrated into a general system, each agency would still be alert to secure its due share of the services to be rendered. Both intrasystem and interagency competition would be carried on in accordance with rules prescribed and enforced by the Government. Private initiative need not be crippled nor the incentive of individual enterprise to improvement and achievement be dulled, provided regulation is intelligently and constructively administered with due avoidance of bureaucratic machinery and methods.

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## EQUITABLE ADJUSTMENT OF INTERCARRIER RELATIONS

In addition to the three objectives of government regulation that have thus far been considered there are three others of manifest importance; they are the equitable adjustment of the relations of the carriers with each other, of the carriers with the public, and of the carriers with their employees. It is these objectives that the public has most in mind in the present discussion of transportation policy.

For many years government regulation did not greatly concern itself with the relations of railroad systems with each other. Connecting railroads were required to do what they were quite willing to do, to unite in establishing joint through routes and rates; but the chief thought of the public was to prevent the railroads from establishing monopolies by agreements as to competitive rates or by the consolidation of competing systems. Until the Transportation Act of 1920 was adopted, railway legislation and the antitrust laws as applied to railroads made it unlawful for competing railroads to act jointly in making rates upon competitive traffic, to pool such traffic or the earnings therefrom, or to form consolidations that would restrict competition. The Act of 1920 provides for the coöperation of competing railway systems, their competitive relations being subject to government regulation. The purpose of the law is to bring about such an adjustment of the relations of railway carriers with each other as will enable them to serve the public adequately and economically. If this purpose is achieved, or to the extent that it is realized, both the railroads and the public will be benefited.

The large task that yet has to be performed to bring about the equitable adjustment of intercarrier relations is to give to each of the main agencies of transportation, the carriers upon railroads, highways, and waterways, their appropriate place in a co-ordinated transportation system. This will be no easy task, but the ultimate objective must be to discover and maintain such relations among the three agencies of transportation as will enable each to render the service it can most efficiently and economically perform. This will also be of maximum benefit to the

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public. As has been stated, the equitable adjustment of the relation of rail, road, and waterway carriers with each other must be preceded by the adequate public regulation of all agencies of transportation.

### EQUITABLE ADJUSTMENT OF RELATIONS OF THE CARRIERS WITH THE PUBLIC

The objective that the general public has especially in mind in the government regulation of transportation is the maintenance of just relations between the carriers and the public. To prevent the railroads from charging unreasonably high or unjustly discriminatory rates and fares was for many years the main purpose of government regulation. Later railroad legislation concerned safety of travel, shipment, and employment; and latterly adequacy of facilities and requirements as to standards of service have received special attention along with the regulation of rates and fares. Most railway abuses having been uprooted, railroad regulation has become increasingly constructive in purpose; at the present moment, the public is, or may well be, chiefly concerned with the adoption of such government measures as will enable the railroads to recover from the ills brought upon them by a prolonged business depression and by the concurrent rapid growth of unregulated competitors.

Public regulation has established equitable relations between the railroads and the public, and has provided an Interstate Commerce Commission that has shown itself equal to the task of maintaining those relations. This, however, solves only a part of the problem of establishing and maintaining an equitable adjustment of the relations of the several agencies of transportation and the public they serve. There is still large opportunity for carriers by water to discriminate between persons and between places as regards services and rates; and interstate carriers upon the highways until the enactment of the Motor Carrier Act of 1935, might make warfare upon other carriers and make discriminations among shippers, without let or hindrance of government regula-

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tion. Presumably the objective that has been reached in the public regulation of the railroads, and that will be attained in the regulation of motor carriers, will be the one sought in the regulation of other agencies of transportation.

The owners of the railroads and other transportation facilities are, from the standpoint of the law, the stockholders of the several companies. As a matter of fact, at least two-thirds of the investment in railroads, and a large though lesser share of the capital of other transportation agencies, has been made by the purchasers of bonds. The holdings of stocks and bonds, especially those of the railroads, are widely distributed among individuals; and the bonds have been purchased in large amount by insurance and other fiduciary institutions. The Government cannot justly overlook its obligation so to regulate transportation as to facilitate the working out and maintenance of an equitable adjustment of the relation of the carriers to that part of the public that has provided and is yet to furnish the funds by which transportation facilities are created and services are rendered. The investing public and the public served are each entitled to the same measure of justice, neither one being more favorably treated than the other.

### EQUITABLE ADJUSTMENT OF RELATIONS OF THE CARRIERS AND THEIR EMPLOYEES

The equitable adjustment of the relations of the carriers and their employees is, and should be, a definite objective of government regulation. The adjustment should be equitable alike to employers and employees, and should include carriers and employees in all the agencies of transportation, not only those by railroad, but also those by highway, waterway, and air. Thus far, Federal legislation and administration have concerned themselves almost solely with the relations of carriers by railroad and their employees. The Federal Government has sought by numerous acts of legislation, which will be discussed in Chapter XI upon "Government Regulation of Railroad Labor," to bring about an equitable adjustment of the relations of the employees and the railroads. If and when all carriers engaged in interstate

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commerce are regulated as the railroads are, one objective of regulation will doubtless be the equitable adjustment of the relations of such carriers and their employees. Public regulation of the relations of the carriers by highways, waterways, and air and their employees is an obligation which the Federal Government must ultimately assume, not only because of its duty to maintain justice in those employments, but also because of its duty to establish equitable relations between the wages and working conditions of those in railroad employment and those working for non-railroad carriers. At present a definite standard, and presumably an equitable one, is maintained regarding wages and working conditions in railroad employment, while another and much lower standard prevails in non-railroad employment. This is unjust alike to the employees of non-railroad carriers and to the employing railroad companies. Moreover, insofar as the lower labor costs of the competitors of the railroads cause the railroads to lose traffic they would otherwise secure, and thus compel them to reduce their services and the number of men employed, railroad employment as a whole suffers a loss. It is easy to understand why railroad labor should favor the government regulation of non-railroad agencies of transportation.

## SUMMARY AND CONCLUSIONS

The objectives of government regulation of transportation have increased in number and changed in emphasis, but have become more definite, as the states and the Federal Government have had experience in meeting the problems as they developed. At the outset the main purpose of public regulation was to correct the abuses that had resulted from unrestricted private management of the railroads. As a result of unlimited competition among the rapidly expanding railroad systems, each striving to bring to its lines traffic that might move over other railroads, the public suffered from unjust discriminations in rates and services and among persons, places, and commodities. Where competition was absent railroad charges were at a maximum, where competition was intense rates and fares were at a minimum. From 1870 on, railroad rate wars followed each other at frequent periods to the

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detriment of the railroads and the public. The railroads sought by associated action to restrain competition within reasonable limits and were unsuccessful, mainly because of their inability to coöperate, but also, partly, because of legislation by which the public sought to curb monopoly and to assure the continuance of competition.

Since 1920 the Government has favored railroad coöperation and consolidation under the regulation of the Interstate Commerce Commission, and has been concerned with adequacy of facilities and economy and efficiency of service, and with the equitable adjustment of the relations of the carriers with each other, with the public, and with their employees. The major objectives of government regulation of the railroads have been attained.

The experience the Government has had in the regulation of railroads should be helpful in deciding upon the objectives to be sought in the regulation of carriers by highways, waterways, and air, and should indicate the road to be followed to reach those objectives. The present task is the regulation of transportation, not the regulation of one but of all the agencies of transportation. The regulation should be such as will enable each class of carriers to function efficiently, to provide adequate facilities, and to perform its services economically. Regulation should further co-operation and coördination within each group of carriers and of the groups or agencies with each other, the ultimate objective being an integrated general system of transportation, each constituent part thereof performing the service that it can render better than can other parts of the system.

In the future regulation of non-railroad carriers—a task that should no longer be neglected—the government objectives will not differ materially from those it has sought to attain in the regulation of railroads. In the regulation of each and all agencies of transportation, the Government will seek to bring about and maintain an equitable adjustment of the relations of the carriers with each other, with the public, and with their employees.



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## CHAPTER IV

### PRINCIPLES THAT SHOULD CONTROL IN GOVERNMENT REGULATION OF TRANSPORTATION

IN the preceding chapter six objectives of government regulation of transportation have been stated and briefly discussed. It remains to consider the principles that should control in legislative and administrative action by which the Government seeks to achieve its objectives. The objectives and principles of government regulation of transportation are two interrelated subjects, or rather two phases of the one subject of government policy towards transportation; but, as an object may often be seen more clearly and be better understood by viewing its major components, so may the Government's transportation policy be more clearly portrayed by discussing separately its two constituents, objectives and principles.

#### CONSTRUCTIVE GOVERNMENT REGULATION OF TRANSPORTATION

The first principle that should be adhered to in the government regulation of transportation is that it should be constructive and not merely corrective in aim. Public regulation of transportation in the United States began with, and for many years was concerned mainly with, the correction of the abuses that resulted from the unrestrained competition of the railroads; but at the present time the major purpose of regulation of transportation is to further its development and improvement. The need of the public being for adequate and efficient transportation by all agencies and facilities—those by rail, road, water, and air—government regulation should be such as will further the satisfaction of that need.

Is this a principle that can be carried out in practice? The answer is not that government regulation is always helpful; state legislatures, Congress, and commissions can make mistakes; laws

## PRINCIPLES THAT SHOULD CONTROL

that were once useful may become needless and may be a hindrance to progress; but, on the whole, public regulation of transportation, which, as far as the United States Government is concerned, has related mainly to railroads, has been constructive both in principle and in fact. One present and future problem of the Government is to apply the principle of constructive regulation to all agencies of transportation.

Experience shows that the government can act constructively in the performance of several tasks of transportation regulation. In England, the railway companies, from the beginning of railroad building, were required to construct their roads in accordance with standards fixed by the Government. This was not required of railroad companies in the United States; but, beginning with the first legislation as to safety appliances in 1893, government regulation has, in effect, set standards to be met as regards locomotives and their equipment, car coupling, air-braking of trains, and the use of steel in construction of passenger cars; it has sought by these and other requirements to bring about improvements in equipment and facilities that will be beneficial to railroad labor and to the public. At the present time the Federal Government is enacting the prelude to a program that will deal with improvements in railroad operating methods and management practices.

The Emergency Railroad Transportation Act of June 16, 1933, created temporarily the office of Coördinator of Transportation and imposed upon him the task of doing what he could, under the powers conferred upon him by the statute, "to encourage and promote or require action on the part of the carriers . . . which will avoid unnecessary duplication of services and facilities . . . permit the joint use of terminals . . . control allowances, accessorial services and charges therefor . . . promote financial reorganization of the carriers . . . and provide for the immediate study of other means of improving conditions surrounding transportation in all its forms and the preparation of plans therefor." Under the able and energetic direction of the Coördinator, the "means of improving conditions surrounding transportation" were investigated and recommendations were made, some of which can be, and may well be, adopted by voluntary action of

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the carriers. Other recommendations called for legislation extending the scope of government regulation of transportation and making it more constructive. Later chapters will discuss how the Government can function constructively in the regulation of railroad and other transportation services, in bringing about the coördination of the facilities and services of railroad, motor, waterway, and air carriers, and in accomplishing other tasks of public regulation.

### IMPARTIAL GOVERNMENT REGULATION

Another principle that should be controlling in public regulation is that the Government should be impartial, the regulated carriers and the public being given equal justice. It is not unnatural that the public should in the past have regarded the regulatory commission through which the Government acts as the advocate or champion by which the public is protected against the carriers. Otherwise stated, the commission has not been thought of as an agency for ascertaining and maintaining just and equitable relations between the carriers and the public and also as an agency whereby the carriers are to be so regulated as regards their relations with each other and with the public that the carriers as well as the public will be assured of equitable treatment.

The principle that public regulation should be equitable alike to the public served and to serving carriers was well stated by the Railroad Commission of California in a report, issued October 10, 1932, setting forth the findings and conclusions reached as a result of a thorough investigation of the question of additional regulation of motor transportation by the State of California. The report contains convincing reasons for more regulation by the state and the Commission reaches the conclusion that:

If commercial and shipping interests are to be stabilized, then definite rates and permanent transportation facilities must be open on an equality to the public. If proper and adequate transportation facilities are to be provided, transportation companies must be protected in their service to the public.

It is hardly necessary to state that the thorough regulation of one essential class of carriers and the non-regulation of another

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and competitive class of carriers does not carry out the principle that public regulation should be impartial and should maintain equitable relations of the several classes of carriers with each other and of all kinds of carriers with the public. It is at best difficult for a public service commission to regard itself as a tribunal for the impartial maintenance of equitable relations between the carriers and the public and not to think of itself solely or mainly as the protector of the public against the carriers; and the difficulty must obviously be made greater if the state official that appoints the commission, the public that brings its cases before the commission, and the press that appraises and criticizes the work of the commission all demand that the commission shall regard itself not only as a bulwark that has been erected by the public for its defense but also as an agency whereby the enemies of the public may be punished. We expect the courts to mete out justice by judicial procedure. Ought we not to expect commissions to sit in impartial judgment as to the rights and merits both of the carriers regulated and of the public served, and to take such administrative action as will assure the equitable adjustment of their interrelations?

### LEGISLATIVE PRINCIPLES AND REQUIREMENTS ADMINISTRATIVELY APPLIED

Public regulation of transportation starts with legislation which designates the carriers to be regulated, and sets forth the obligations to provide adequate facilities and services, to make reasonable and just charges, and to observe various other requirements as to the conduct of their business. The corporate affairs and intercorporate relations of the railroads engaged in interstate commerce are comprehensively regulated by the Federal Government, while the several states provide with varying degrees of completeness for the regulation of the railway facilities and services employed in intrastate transportation. Legislation defines the general scope of regulation and the specific matters to be regulated, and then provides for the application and enforcement of the law by an administrative commission.

When, in 1854, Great Britain enacted her first law prohibiting

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railways from charging unreasonably high or unjustly discriminatory rates, no special provision was made for the enforcement of the laws. Parliament assumed that shippers would appeal to the courts if they were being unlawfully treated; but shippers were afraid of prosecuting the carrier upon whose services they were vitally dependent, preferring to bear the ills they had rather than to fly to others they knew not of. It was not until 1873 that Parliament acted, creating a railroad commission. The commission that was temporarily established in 1873 was continued from time to time until 1888 when it was made permanent and given enlarged powers. Since 1888, and particularly since the World War, Parliament has developed a complete administrative organization for the regulation of railroads and for the enforcement of laws that provide a substantial measure of regulation of highway carriers.

Different policies as regards the administrative regulation of railroads were followed in the United States when the states began to legislate. Massachusetts, in 1869, provided for a railroad commission with only supervisory advisory functions; it could make investigations and could report such violations of the law as were discovered; and it could make recommendations to the legislature concerning needed changes in the law. The support of public opinion enabled the commission to perform its task satisfactorily, and it was not until 1913 that Massachusetts adopted the policy that had long prevailed in other states and gave her railroad commission power to issue orders that the carriers must obey unless they obtained relief therefrom by action of a court. Illinois, Wisconsin, and Iowa began regulating railroads by passing laws fixing maximum rates and fares. Commissions were created to enforce the laws. Such laws were soon changed, however, and the fixing of rates was made the duty of the commissions in those states that provided for establishing rates by public authority.<sup>1</sup> Legislature-made rates were too inflexible. They could not be modified with changes in economic and competitive conditions. The satisfactory making and adjustment of railroad rates

<sup>1</sup> An account of "The Regulation of Railroads by the American State Governments" is given in Chap. xxv, pp. 422-447, *Principles of Railroad Transportation*, by E. R. Johnson and T. W. Van Metre (1921).

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by public authority could be done only by administrative action. Passenger fares were fixed by legislation in some states after the making of freight rates had been left with the commissions; but when the Interstate Commerce Commission, acting under the Transportation Act of 1920, fixed interstate passenger fares higher than the maxima established by state laws, such laws became invalid. They were wrong in principle and their nullification was for the best.

The Federal Government and, for the most part, the states have provided for the regulation of carriers by enacting laws which state in general terms the objectives of regulation, and the standards to be met by the regulated corporations as to adequacy of service and reasonableness of charges, the requirements as to keeping accounts and issuing securities, and as to intercorporate relations. The interpretation, application, and enforcement of the laws thus enacted are vested in a commission that is usually given (and should always be granted) sufficient discretion to enable it, by appropriate administrative action, to accomplish the effective and constructive regulation of the corporations subject to its jurisdiction.

### ADMINISTRATIVE DISCRETION ESSENTIAL TO WISE REGULATION

Administrative discretion is essential to the successful application of sound principles of regulation to transportation, a business peculiarly subject to the control of economic conditions and forces which are never static and which, for well-known reasons, tend to change and shift with increasing frequency. Under present conditions, it is even more necessary than it formerly was that public regulation of the railroads and other agencies of transportation should be made flexible by giving the Interstate Commerce Commission and the state commissions administrative discretion in the enforcement of laws which embody general principles and set up general standards, but do not contain specific rules and regulations that must be enforced.

The duty of the legislature to enact such legislation as will make possible the flexible administrative regulation of transportation does not end with the initial adoption of a regulatory law.

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The legislature has the added duty of refraining from subsequently passing laws requiring the Commission to take specific action regarding matters upon which it would otherwise act in a discretionary manner under the general provisions of the fundamental act of the legislature. There is always the danger that those who are specially interested in some particular requirement will bring about legislation requiring the Commission to take specified action regarding designated matters. Such action by the legislature may not be inspired by political motives, although it is quite certain to be taken to meet the wishes of a particular portion of society or section of the country instead of being action of interest to the public in general; whether or not the purpose of the special legislation be political, the effect is to limit the ability of the Commission to exercise its discretion in deciding questions in accordance with its judgment as to what is in the public interest.

Congress has, on the whole, exercised commendable restraint regarding the passage of special legislation giving the Interstate Commerce Commission instructions as to what it shall do concerning particular matters; but an instance of what should not be done by Congress was the passage of the Act, approved August 18, 1922, directing the Commission, after giving notice and having a hearing, to require carriers to issue interchangeable mileage or script coupon tickets "at just and reasonable rates."<sup>2</sup> The Commission was obedient to the supposed wishes of Congress and decided (four members dissenting) that the carriers should issue the interchangeable mileage tickets at 20 per cent less than the regular fare. The dissenting commissioners held that the order was unjustly discriminatory, this view being expressed by Commissioner Hall as follows: "The majority recognize that the demand for this ticket comes chiefly from organizations of commercial travelers, and that what they seek is a lower rate than that paid by other travelers who do not hold such tickets. In other words the holders of these tickets are to be a preferred class, whatever may be the just and reasonable rate paid by the public

<sup>2</sup> This action of Congress is ably and critically discussed in I. L. Sharfman, *The Interstate Commerce Commission*, Vol. II, pp. 467-469.



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generally.” The carriers secured from the United States District Court for the District of Massachusetts an injunction against the enforcement of the Commission’s order, and the action of the District Court was affirmed by the Supreme Court which, after reviewing the grounds upon which the Commission had based its action, held that, “It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress.”

Another instance of special legislation by Congress to influence the action of the Commission in making and adjusting rates was the Hoch-Smith Resolution, adopted January 30, 1925, which declared that in rate-making “the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so,” and that, “In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture, including live stock, at the lowest possible lawful rates compatible with the maintenance of an adequate transportation service.” This action was taken by Congress in response to the demands of those who were dissatisfied with decisions that had been made by the Commission, and, although the Resolution did not state specifically what rates should be made by the Commission, it was nevertheless a mandate by which the Commission was influenced in making rates on grain and grain products, live stock, and fruit, the view held by the Commission being that although the Resolution “sets no new standards of lawfulness” it requires “that agricultural products affected by depression shall be included in the class of most favored commodities, to such extent, at least, as may be compatible with the maintenance of adequate transportation service.”<sup>3</sup> This interpretation of the Resolution was not sustained by the United States Supreme Court before which the question came upon an appeal from a decision of the Commission, in 1927, reducing rates on deciduous fruits

<sup>3</sup> Grain and Grain Products, 122 I.C.C. 125 (1927).

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from California to eastern points.<sup>4</sup> The Commission had two years earlier held to be reasonable and lawful the rates that were in 1927 held to be unreasonable because of the Hoch-Smith Resolution. The Court held that the Commission erred in having construed the Resolution as making a change in the basic law and "requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently . . . they must have been upheld as reasonable and lawful."

Congressional interference with the discretion of the Commission in determining the reasonableness of railroad rates was threatened, but fortunately averted, in another instance. In 1920, the Commission in connection with the general increase made in rates because of the higher prices following the World War authorized the addition to Pullman sleeping- and chair-car rates of a surcharge of 50 per cent, the surcharge to go to the railroad companies. The Commission upheld its action by subsequent decisions, although there were dissenting members who questioned the wisdom of the policy. Congress was urged by organized interests that objected to the surcharge to abolish the charge by legislation, and in February, 1925, the Senate took favorable action, but the House of Representatives did not concur in such action and the Commission's discretion was not interfered with.

The foregoing statements indicate that Congress has not seriously limited the exercise of discretion by the Interstate Commerce Commission in applying the principles and enforcing the requirements of the fundamental statute concerning the public regulation of the railroads. Moreover, in the two instances of special legislation—the Act regarding the issue of interchangeable mileage tickets and the Hoch-Smith Resolution—the Supreme Court so interpreted the special acts of Congress as to safeguard the Commission's independence. There seems to be an increasingly strong sentiment in Congress against legislative or political interference with the administrative functioning of the Commission. The attitude that Congress should maintain towards the Commission was well stated by Congressman Sam Rayburn

<sup>4</sup> *Ann Arbor Railroad Co. et al., Appts., v. U.S., Interstate Commerce Commission, and California Growers and Shippers Protective League*, 281 U.S. 658-659, decided June 2, 1930.

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when Chairman of the Committee on Interstate and Foreign Commerce of the United States House of Representatives, his view being that:

“The functions of the Commission are legislative, judicial, and executive. The Commission is really an arm of Congress. It is really a group of experts who are assigned, by the Congress, duties requiring continuous application of such technical knowledge and experience as to render it inexpedient and impractical for the Congress itself to undertake to discharge the duties. The aim of the Congress is to have an independent, non-partizan agency which will function free from political pressure in carrying out such mandates as are laid down in statutes formally enacted and in discharging such administrative duties as are required by statute.”<sup>5</sup>

It is possibly unnecessary to add that the administrative regulation of transportation, in order to be successful, must not only be unhampered by legislative and political interference, but must also be kept flexible by avoidance of the rigidity and red tape that often clog bureaucratic machinery. Fortunately, the Interstate Commerce Commission has had commendable success in organizing and carrying on its many activities. Its bureaus, 14 in number, function efficiently, each being under the supervision of some member or division of the Commission. Specific provision has been made within the organization of the Commission and its staff for the performance of each task, and the incoming demands upon the Commission, other than the matters connected with the routine work of the bureaus, enter by way of the office of the secretary who refers the work to be done to the appropriate bureau or division of the general organization. The very magnitude of the Commission's task has apparently brought about the building up of an efficient organization by the Commission, an achievement that has been made possible by the Commission's freedom from political interference and by its adherence to the merit system in selecting its employees.

<sup>5</sup> From an address delivered Nov. 15, 1934, at the Forty-sixth Annual Meeting of the National Association of Railroad and Utility Commissioners in Washington, D.C. See annual Report of the Association.

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## GOVERNMENT REGULATION SHOULD STIMULATE PRIVATE INITIATIVE

Another principle that should be controlling in the public regulation of transportation is that the Government should not only endeavor not to discourage private initiative but should seek to establish conditions that will stimulate private enterprise. That this is a difficult principle to carry out in practice will be admitted. Can it really be adhered to, and if so, by what means?

The importance of this principle was long ago emphasized in the Hepburn Report. This report, made in 1879, by an investigating committee of the New York State Assembly, stated that, "The business of transportation requires the greatest freedom of action of any business extant," and the committee warned against the "danger of imposing cast iron regulations upon the railroads. . . . A railroad in order to be successfully managed and prosperous . . . must be run by brains, not by legislation."<sup>6</sup> It may be assumed that in making this statement the New York legislative committee did not intend to suggest that legislation does not represent brain activity, but rather that in the legislative and administrative regulation of railroads, and the same would be true of other agencies of transportation, care should be taken not to substitute government for private, i. e., corporate, initiative and enterprise in the operation and development of the railroads.

That there is need of being on guard against excessive detail in the regulation of railroad equipment and operating methods is due to the fact that government requirements as to safety appliances and other equipment details may be desirable and important when they are first imposed and for some time thereafter, but may in time become not only unnecessary but even a hindrance to improvement. Such regulation tends to be cumulative and more detailed, while at the same time technical improvements in equipment make government regulation less necessary. Moreover, the individual and associated action of the carriers in

<sup>6</sup> Proceedings of the Special Committee on Railroads, New York Assembly, 1879. The report is regularly referred to as the Hepburn Report, after the name of the Chairman of the Committee.

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adopting safety appliances and improvements in equipment, and in enforcing rules and regulations as to what equipment may be used and how it shall be operated, enables the carriers to perform efficiently and with less expense to themselves and the public what the government previously sought to accomplish by detailed requirements.

This was the conclusion reached by the Special Committee on Railroads appointed in 1932 by the Chamber of Commerce of the United States which included in its report a discussion of, "Unnecessary and hampering regulations," under which caption it stated in part that, "To the original simple regulation has been added a multiplicity of requirements," and the report described briefly "unnecessary or unduly elaborate regulation . . . applying to the development of containers, locomotive and car equipment, automatic train control and other mechanical improvements, which have tended to transfer responsibility from railway managements to the Interstate Commerce Commission." <sup>7</sup> This report was sent by the Chamber of Commerce of the United States to its constituent members, the Chambers of Commerce and Boards of Trade throughout the United States, and these organizations were asked to vote upon the question discussed in the report. One of the 12 propositions thus submitted to a referendum vote was stated as follows: "Regulation of railroads should be reduced to the point where it will be confined to assurance of fair rates and of public safety and will avoid interference with functions belonging to management."

On this proposition the 1,045 organization members of the Chamber of Commerce of the United States cast 2,180 votes in the affirmative and only 85 in the negative.<sup>8</sup>

One method of keeping the regulation from becoming too detailed and of omitting from regulation such matters as no longer need to be subject to government rules might be to have a formal review each decade of the task of regulation and such revision of legislation and administrative action as was found to be appro-

<sup>7</sup> Referendum No. 62 on the Report of the Special Committee on Railroads. Submitted to referendum vote, Oct. 28, 1932.

<sup>8</sup> Special Bulletin, Jan. 5, 1933, Chamber of Commerce of the United States. The number of votes cast by an organization is proportionate to its membership.

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priate. This would seem to be a businesslike way of keeping the machinery of regulation geared to the work to be done.

### REGULATION OF RAILROADS BY PARTIAL NATIONALIZATION UNWISE

In the early years of government regulation of railroads in the United States and in other countries it was thought by many that the best way to regulate private railroads was for the Government to construct or acquire some railroad lines and operate them in competition with those corporately owned and operated. In 1874, a committee of the United States Senate made a carefully prepared report—the Windom Report,<sup>9</sup> so named from the Committee's Chairman, Senator Windom—which recommended the construction and operation by the United States Government of a double-track railroad from the Mississippi River to the Atlantic Ocean, it being the belief of the Committee that "the state ownership or control of one or more lines which, being unable to enter into combination, will serve as regulators of the other lines." Fortunately this recommendation was not adopted. The usual sequel of partial nationalization of railroads—and the logical one—has been the government acquisition and operation of all the railroads in the country in question.

As was pointed out in Chapter II, government ownership and operation of the railroads may be expedient and desirable in some countries; and, when such a situation develops as confronted Canada in 1917, the partial nationalization of the railroads of the country may be necessary, at least as a temporary measure. The general objections to the partial nationalization of railroads, or of the services of transportation by water, are that the participation of the Government in business, in competition with corporate enterprise, limits the field of private enterprise and discourages private initiative, even where the competitors are kept on a common footing by requiring the earnings of government as well as corporate enterprises to cover capital costs, depreciation and obsolescence, maintenance and operating expenses, taxes, and normal business profits.

As a matter of fact, however, the Government seldom competes

<sup>9</sup> Senate Report No. 307, 43rd Congress, 1st Session.

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with private enterprise under like conditions. The Government is apt to consider capital obtained from general tax levies as funds that the public can use in carrying on public or government enterprises without paying interest on the invested capital. Moreover, why should the public pay taxes on its own property? Those who ask this question purposely or unconsciously ignore the fact that the non-interest-paying funds of a particular business activity of the Government are derived from, or are paid for by, the general public, while only a particular part of the public or only a section of the country is served. The non-interest-paying tax-free National Waterways Corporation by which the Government competes with private carriers by water and by rail affords an illustration of the manner in which the Government is apt to compete with private enterprise. If the Government goes extensively into the development of hydro-electric power and the sale of electricity, will the Government require its enterprises to carry the same burden or charges that its competitors must carry—interest on the full amount of the investment, allowance for depreciation and obsolescence, operating and maintenance expenses, local, state and Federal taxes, and normal business profits?

In a country such as the United States where private capital is abundant and where corporate management is well developed and efficient, there is no reason why the Government should lessen or discourage private initiative and enterprise by owning and operating the railroads, or by performing water or other transportation services. The public interests can be protected by government regulation, and the public will be more economically and efficiently served by the carriers.

### GENERAL SUMMARY

In the foregoing discussion of the principles that should be controlling in the government regulation of transportation, more references have been made to the railroads than to the other agencies of transportation; but the same general principles should be adhered to in the regulation of carriers by rail, road, water, and air. The long experience that the Federal Government

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and the states have had in regulating railroads should be helpful in applying sound principles to the regulation of road, water, and air carriers. After considering in Part II the authority of the state and Federal governments to regulate transportation, and describing the agencies or commissions that have been established by the state legislatures and by Congress to administer the regulatory laws that have been enacted, railroad regulation and the major problems and policies connected therewith will be discussed in a series of chapters. That discussion will be followed by a similar treatment, in Parts IV, V, and VI, of government aid and regulation of transportation by water, by highways, and by air. In the discussion of the concrete problems of regulation and of the policies that have been, or should have been, followed in dealing with those problems, there will be frequent consideration of the principles that should control in the regulation of transportation and of the extent to which they have or have not been followed in actual practice.

### REFERENCES

- Eastman, Joseph B., Regulation of Transportation Agencies, Senate Document No. 152, 73rd Congress, 2nd Session, (1934).
- Johnson, E. R., Huebner, G. G., and Wilson, G. Lloyd, *Principles of Transportation* (1928). Consult contents for list of chapters dealing with government regulation.
- Sharfman, I. L., *The Interstate Commerce Commission* (1931), Vol. II, pp. 345-489, where the subject of "The Exercise of Administrative Discretion" is discussed.



PART II

AUTHORITIES AND AGENCIES OF  
GOVERNMENT REGULATION  
OF TRANSPORTATION



## CHAPTER V

### STATE AND FEDERAL AUTHORITY: THE DUAL SYSTEM OF REGULATION OF RAILROADS

GOVERNMENT in the United States is exercised by two authorities, the states and the Federal Government, each theoretically sovereign, or possessing sole jurisdiction, within its own field. The states have, by adopting the Constitution of the United States, vested certain powers in the Federal Government, and the people of the several states, in the exercise of their sovereignty, have established governments, each one possessing such powers as are set forth in the constitution of its state. The Federal Government being one having delegated powers set forth in a written constitution, it would seem easy to define the boundary line between Federal and state authority; but, in fact, the boundary is often difficult to locate and define, and this is due to several causes.

One cause is that a far-reaching power, such, for instance, as that of regulating commerce among the states, can be effectively exercised only by assuming that those things may be done that must be done to give effect to the delegated power. Thus the power to regulate interstate commerce gives the Federal Government, by necessary inference, authority over the facilities and agencies of interstate commerce. Moreover, as such facilities and agencies may and usually do perform both intrastate and interstate commerce, they are subject to the regulatory authority of both the states and the United States; and as the Federal Government cannot be prevented or limited by the states in the exercise of the power that has been delegated to it, the growth of interstate commerce in volume, its integration into a country-wide unity, and the employment of the same facilities for local and interstate trade and transportation have inevitably been accompanied by an expansion of Federal jurisdiction and a corresponding curtailment of the authority of the states, as the United States has proceeded with the performance of the ever-enlarging task of regulating interstate commerce.

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The dual system of state and Federal government in the United States complicates the problem of public regulation of transportation. Fortunately, however, the experience which the states and the United States have had, over a period of a half century, in the regulation of railroads has resulted in defining the boundary of state and Federal jurisdiction with such clearness as to enable each authority to proceed without difficulty with the completion of the task of regulating intelligently and adequately all of the agencies of transportation. While the Supreme Court of the United States in the years to come will doubtless decide many cases that may alter the distribution of authority between the states and the National Government, the powers that the states and the Federal Government are now known to possess over the facilities and agencies of transportation are definite and sufficient. Prompt action may be taken. The purpose of this, and the succeeding chapter, is to state briefly the legislative and executive authority that the states and the Federal Government have over carriers by rail, road, water, and air.

### AUTHORITY OF THE STATES OVER RAILROADS

The authority of a state to regulate intrastate commerce and its agencies is inherent in its general power to safeguard the lives and health and the individual rights of its citizens. This authority is made specific and defined by the provisions of the state constitution, and is exercised by legislation and by the executive organs thereby created. The regulation of the facilities employed and the services rendered by the intrastate carriers by railroad may well be considered first.

Railroads in the United States are owned and operated by corporations chartered by the states. During the early decades of railroad history, the charters were granted by special acts of the state legislatures; later, general laws were enacted applying to the incorporation of railroads and other corporations.<sup>1</sup> With the development of state regulation of the railroads, it was logical that railroad charters, granted in accordance with general in-

<sup>1</sup> B. H. Meyer, *Railway Legislation in the United States* (1903). Chap. ii, Part I, and Chaps. i and ii, Part II, contain a good historical and descriptive account of railroad charters.

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corporation laws, should not become valid until approved by the state railroad or public service commission. In general, at the present time, a company seeking a charter authorizing the construction of a railroad must convince the regulatory commission that the proposed road is needed in the public interest, and the company's financial plans must also be acceptable to the commission. Moreover, if the proposed railroad is to be employed in interstate commerce, as practically all railroads must be employed, the company must secure the approval of the Interstate Commerce Commission, which has authority to pass upon the questions of public necessity, the proposed location, and the kind, quantity, and price of securities to be issued to finance the enterprise. In a word, the states and the Federal Government have taken full control of the future changes in the country's railroad net.

The charters granted to railroad companies gave them authority to fix the charges for their services, sometimes within designated maxima but often without any limitation upon charges; and, although a few states required rates to be reduced, or contributions to be made to the state treasury, when net earnings exceeded a designated percentage of profits (in one state 12 per cent, in another 20 per cent), the charter provisions accomplished no real or effective regulation of railroad rates. Such regulation began in the early eighteen-seventies, when the so-called "Granger Laws" of several states provided for the public control of rates, usually by means of commissions created to enforce the regulatory statutes.

The enactment and enforcement of the Granger Laws naturally raised the question as to power of the states to fix or regulate railroad rates by legislative action. The states had granted charters to the railroad companies empowering them, in some instances, to charge rates within maxima named in the charter or giving the companies in other instances unrestricted authority to fix the rates charged for services rendered. Having granted the companies such charters, could the state subsequently, either directly by statute, or by the agency of a commission, fix the rates that must be charged?

This question was answered by the decisions of the United

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States Supreme Court in the Granger Cases. In the leading case, *Munn v. People of Illinois*,<sup>2</sup> the Court states "that when property is affected with a public interest it ceases to be *juris privati* only," and that:

When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. Common carriers exercise a sort of public office and have duties to perform in which the public is interested. . . . Their business is, therefore, "affected with a public interest."

In applying this principle in upholding a statute of Iowa fixing maximum railroad rates, the Court held that, "Railroad companies are . . . engaged in public employment affecting the public interest and . . . subject to legislative control unless protected by their charters." The Court was careful to state that a charter is a contract that cannot be impaired by the state legislature; but, unless the charter granted to a railroad company contains a provision that the state shall not fix the rates, the state does not violate a contract in fixing the rates to be charged by the railroad company.<sup>3</sup> This principle was also held by the Court to validate a law of Wisconsin fixing maximum railroad fares and rates, although the complainant railroad company had been authorized by its charter "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The opinion of the Court was "that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter."<sup>4</sup>

The Court, in the decision just quoted, even went so far as to state that:

<sup>2</sup> 94 U.S. 113-154. This and three railroad cases, decided at the same time, March 1, 1877, constitute the Granger Cases. In *Munn v. Illinois*, the Court upheld the power of the Illinois legislature to fix the maximum charges for the storage of grain in warehouses in Chicago and other places in the state. In this decision the Court developed the principles that were applied in deciding the three railroad cases. The *Chicago, Burlington and Quincy Railroad Co. v. Cutts*; *Peik v. Chicago and Northwestern Railway Co.*, and the *Chicago, Milwaukee and St. Paul R.R. Co. v. Ackley*. The railroad decisions are in 94 U.S. 155-179.

<sup>3</sup> *Chicago, Burlington and Quincy Railroad Co. v. Cutts*, 94 U.S. 155.

<sup>4</sup> *Peik v. Chicago and Northwestern Railway Co.*, 94 U.S. 178.

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“Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.”

Had this opinion as to the finality of legislation fixing railroad rates been subsequently adhered to by the Court, it would have barred the Court from passing upon the reasonableness of rates fixed by a state legislature, from deciding whether the rates so fixed resulted in depriving the carriers of their property without due process of law, i. e., without a judicial determination of their property rights. As will be pointed out in a later chapter, it was not many years before the Supreme Court corrected the mistake it had made in holding that “the legislature may fix a limit to that which in law shall be reasonable.” As will be explained in discussing the court review of state-made rates, the doctrine and practice of review have been fully developed; and the Fourteenth Amendment to the Constitution of the United States, which prohibits the states from depriving a person of property without due process of law, has been so interpreted as to impose a definite limit upon the legislative power of the states to regulate railroad rates and fares.

One other fundamental question that was raised in the Granger Cases was whether a state in fixing the rates that the railroads might charge for transporting persons or property within the state was interfering with, or regulating, interstate commerce. The states, in fixing railroad rates, had not limited their action to traffic that did not cross state boundaries, but each state had established maximum charges for all traffic moved by rail within the state. In upholding the Illinois law fixing charges of grain-elevators and warehouses, the Court said, “Their regulation is a thing of domestic concern and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction”; and in applying this principle to the regulation of railroad rates the Court held in the *Peik v. Chicago and Northwestern Railway* case that, “Until Congress acts in reference to

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the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern.”

However, before Congress began the regulation of interstate railroad rates, the power of the State of Illinois over the rates from points in the state to points outside thereof was questioned by an interested carrier which had lower rates to New York from Peoria, Illinois, than from Gilman, Illinois, the latter city being 86 miles nearer New York; and the Supreme Court in the case of *Wabash v. Illinois*,<sup>5</sup> which was decided October 25, 1886, three justices including the Chief Justice dissenting, held, after reviewing its rulings in *Munn v. Illinois* and other cases, “that it is not and never has been, the deliberate opinion of a majority of this Court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.” The effect of this decision was definitely to limit the authority of the states over railroad rates to the charges upon strictly intrastate transportation. The following year Congress passed the Interstate Commerce Act.

### FEDERAL JURISDICTION OVER RAILROADS

The Constitution of the United States, by vesting in Congress the power, “To regulate commerce with foreign nations, and among the several states,” gives the Federal Government definite and full authority to regulate interstate transportation by railroads and other carriers. The question as to the plenary power of Congress to regulate interstate commerce and the facilities and agencies thereof was settled in the affirmative by the Supreme Court in 1824, in deciding that the State of New York could not prohibit vessels, licensed according to the laws of the United States, from navigating the waters of that state. The Court, speaking through Chief Justice Marshall, said of the power to regulate commerce among the several states:

“This power, like all others vested in the Congress, is complete

<sup>5</sup> *Wabash, St. Louis and Pacific Railway Co. v. People of the State of Illinois*, 118 U.S. 557-596.



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in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government.”<sup>6</sup>

The Federal Government in the exercise of its power to regulate carriers engaged in interstate commerce is subjected, by the Fifth Amendment to the United States Constitution, to the limitation imposed upon the states by the Fourteenth Amendment—that “no person shall be deprived of life, liberty, or property without due process of law”; and this has been interpreted by the courts to mean that the owner of property is protected, not only from seizure of his property without reasonable compensation, but also against having his property made valueless by laws that prevent the property from earning a fair return for its use. The significance of this limitation upon the power of the Federal and state governments to regulate railroad and other interstate carriers will be indicated in Chapter VII where there is a discussion of the development of court review of statutory and administrative regulation of carriers.

The scope of the Federal jurisdiction over interstate railroad rates and fares, and the extent to which the authority of the states over intrastate rates and fares has been limited by the Federal Government in the exercise of its power to regulate interstate commerce, may be shown by referring briefly to five of the numerous decisions of the Supreme Court that might be cited.

One of these five cases, that of *Wabash v. Illinois*, has already been referred to. By its decision in this case the Supreme Court denied the states any power to regulate interstate railway rates, although such rates had not been regulated by the Federal Government; but the boundary between state and Federal jurisdiction over railroad rates was not defined. This was done not by one decision, but by a series of opinions of the Court, the first important one being that in *Simpson v. Shepard*, decided in 1913 (230 U.S. 252).

<sup>6</sup> *Gibbons v. Ogden*, 22 U.S. 196-197.

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The question at issue in *Simpson v. Shepard* was the validity of the maximum railroad rates and fares on intrastate traffic in Minnesota that had been established by the legislature and the Railroad and Warehouse Commission of that state. These rates thus fixed were lower than those on interstate traffic and the railroads affected by the intrastate rates sought to have the courts set aside the rates as unlawful because they were unreasonably related to the interstate rates and thus placed a burden upon interstate commerce. The Court, however, denied the petition on the ground that:

“The question whether an undue or unreasonable preference or advantage to any locality forbidden by the Interstate Commerce Act of 1887, Section 3, arose from the operation of an intrastate as compared with an interstate rate, or whether any locality was thereby subjected to an undue or unreasonable prejudice or disadvantage would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts.”<sup>7</sup>

Inasmuch as the Commission had not investigated the relation of the rates on traffic within Minnesota to the rates on interstate traffic and had not held that the relationship of the state and interstate rates resulted in placing upon interstate traffic an undue burden, the question before the Court was whether the Minnesota rates were *per se* reasonable; and the Court held that, with the exception of one railroad, the complainants had not shown that the state-made rates were confiscatory.

The decision of the Supreme Court in the Minnesota Case, in 1913, seemed to uphold the authority of the states to make and maintain railroad rates on intrastate traffic, without being controlled in their action by the level of interstate rates, provided the intrastate charges were *per se* reasonable. The following year, however, the Supreme Court, by its decision in the Shreveport Case<sup>8</sup> held that the Interstate Commerce Commission could compel the railroads to maintain such a relationship between interstate and intrastate rates as will avoid undue discrimination

<sup>7</sup> Quoted from the Summary of the Decision.

<sup>8</sup> *Houston, East and West Texas Railway Co. and Houston and Shreveport Railroad Co. et al., v. U.S.*, 234 U.S. 342.

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and will not unjustly burden interstate commerce. The Interstate Commerce Commission had found that the carriers were maintaining higher commodity rates from Shreveport, Louisiana, to points in Texas than were in force "from cities in Texas to such points under substantially similar circumstances and conditions," and were thus giving "an unlawful and undue preference and advantage" to the Texas cities. The carriers were ordered by the Commission to correct the discrimination, which they did by raising to the interstate level the rates in Texas, which rates had been fixed by the Railroad Commission of Texas. This order of the Interstate Commerce Commission and the action taken by the carriers in complying therewith were upheld by the Supreme Court whose decision was that, "So far as these interstate rates conformed to what was found reasonable by the Commission the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination."

By the Transportation Act of 1920, the Interstate Commerce Commission was given statutory power to prevent "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" by the states by prescribing the intrastate "rate, fare, or charge . . . thereafter to be charged and the classification, regulation, or practice thereafter to be observed"; and the carriers are obliged to observe the order of the Commission, "the law of any State or the decision or order of any state authority to the contrary notwithstanding." Thus the principle established by the Supreme Court in the Shreveport decision, that the Federal Government has the authority to maintain a reasonable or just relationship between intrastate and interstate railroad rates, was made more definite and, in fact, broadened in scope by congressional action.

The states did not accept without contest this extension of the power of the Federal Government to change state-made rates. Following the return of the railroads to their owners at the end of the period of government operation, as required by the Transportation Act effective March 1, 1920, the Interstate Commerce Commission, by its report and order of November 27, 1920, raised

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interstate freight rates and passenger fares and Pullman charges above the charges prevailing in Wisconsin, New York, and other states. The railroads in Wisconsin applied to the State Railroad Commission for corresponding increases in intrastate rates and fares; and the Commission granted the increase in freight rates, but refused to change passenger fares and charges because there was a state statute prescribing a maximum passenger charge of two cents a mile. The Interstate Commerce Commission ordered the passenger charges—passenger fare, excess-baggage charges, and Pullman surcharges—to be changed to those that had been fixed for interstate services. The railroads obeyed the order, and filed bills in equity in the United States District Court to enjoin the State Railroad Commission of Wisconsin from interfering with the maintenance of the fares that had been ordered by the Interstate Commerce Commission. The District Court granted an injunction against the State Commission, and this action was confirmed by the United States Supreme Court.<sup>9</sup> In its decision, which was rendered by Chief Justice Taft, the Court called attention to the statement in the report of the Interstate Commerce Commission that, if the passenger charges that had been fixed by Wisconsin remained unchanged, “the net income of the interstate carriers of the State will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates.” This would be “an undue, unreasonable, and unjust discrimination against interstate or foreign commerce”; and “Congress, as the dominant controller of interstate commerce, may . . . restrain undue limitation of the earning power of the interstate commerce system in doing state work.” This “does not involve general regulation of intrastate commerce. . . . Action of the Interstate Commerce Commission . . . must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.”

The principles laid down in deciding the Wisconsin Rate Case were followed by the Supreme Court in a decision rendered on

<sup>9</sup> *Railroad Commission of Wisconsin v. Chicago Burlington & Quincy Railroad Co.*, 257 U.S. 561, decided Feb. 27, 1922.

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the same date, upholding a United States District Court in refusing a petition of the State of New York which sought an injunction against the enforcement of an order of the Interstate Commerce Commission "requiring the interstate railroads operating in intrastate commerce in the State of New York to charge in such commerce 3.6 cents per mile for all passengers, 20 per cent increase over the then excess baggage rates to intrastate passengers, a surcharge of 50 per cent of the charge for space in sleeping cars to such passengers, and 20 per cent increase in intrastate rates on milk, all for the purpose of bringing the intrastate rates to the level of the interstate rates previously fixed by the Commission."<sup>10</sup> The Public Service Commission of the State of New York increased freight rates in the state to the level that had been given interstate rates, but did not raise passenger fares and milk rates. During the period of war control of railroads by the United States, passenger fares had been fixed by the President at three cents a mile, and, upon the return of the railroads to their owners for operation, charges previously in force would become effective. Among the charges in question was a maximum passenger fare of two cents a mile between Albany and Buffalo which was required of the New York Central Railroad Company by the charter that had been granted it by state statute. Could the Interstate Commerce Commission annul a contract between the state and the railroad company? The Court's answer was that the provision in the Federal Constitution that, "No state shall . . . pass a law . . . impairing the obligation of contracts" does not restrict the United States, and that no state can obstruct or regulate interstate commerce, or can unduly burden interstate commerce. If the order of the Interstate Commerce Commission had not been carried out, railway revenues in the State of New York would have been nearly 12 million dollars less annually, and in consequence interstate fares and charges would have to be higher to enable the railroads "to provide the people of the United States with adequate transportation."

These decisions of the Supreme Court give the Federal Government plenary power to regulate interstate transportation by railroads. In exercising their power to regulate intrastate trans-

<sup>10</sup> State of New York v. U.S., 257 U.S. 591-602.

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portation, the states may not limit the power of the Federal Government to regulate interstate carriers, nor may the states unduly burden interstate commerce. The decisions in the Shreveport, Wisconsin, and New York rate cases are in line with the reasoning of Chief Justice Marshall nearly a century earlier in the case of *Gibbons v. Ogden*.

In the exercise of its jurisdiction over interstate railroad carriers the Federal Government has put in force a comprehensive plan of regulation which includes: (1) government approval of the construction of new roads, the abandonment of existing lines, and the issue of securities; (2) requirements and rules as to equipment and services; (3) hours of labor and working conditions of employees; (4) rates and fares; and numerous other requirements. The details of government regulation of railroads and the major problems and policies connected therewith will be discussed in the chapters contained in Part III of this volume.

### REFERENCES

The main sources of information are the decisions of the United States Supreme Court in the cases referred to in the text and foot-notes of this chapter.

Daggett, Stuart, *Principles of Inland Transportation*, revised edition (1934). Chap. xxix, "Early State Legislation—Granger Laws," and Chap. xxx, "The Act To Regulate Commerce and Its Later Amendment."

Johnson, E. R., Huebner, G. G., and Wilson, G. Lloyd, *Principles of Transportation* (1928). Chap. xxvi, "Regulatory Powers of the States and the Federal Government."

Jones, Eliot, *Principles of Railway Transportation* (1924). Chap. x, "State Regulation," and Chap. xi, "The Act to Regulate Commerce of 1887 and Its Interpretation."

Meyer, B. H., *Railway Legislation in the United States* (1903).

## CHAPTER VI

### STATE AND FEDERAL AUTHORITY: THE DUAL SYSTEM OF REGULATION OF HIGHWAY, WATERWAY, AND AIR CARRIERS

THE source and general scope of the power of the states to regulate intrastate commerce and carriers have been briefly set forth in the preceding chapter. In general, the line dividing the authority of the states and of the Federal Government over railroads coincides with the boundary between state and national jurisdiction over highways and waterways. The states, however, possess certain special powers over highways resulting from the fact that the public roads are state highways, while the jurisdiction of the Federal Government over the use and users of inland waterways is broadened, in practice if not in legal theory, by the circumstance that the navigable channels are improved, extended, and maintained by the United States Government. Even such state canals as the Erie Canal in New York and the Illinois and Mississippi Canal, which are built to serve interstate as well as intrastate commerce, must conform to the requirements that the Federal Government may exact in the exercise of its power to regulate interstate commerce.

#### AUTHORITY OF THE STATES OVER INTRASTATE CARRIERS ON THE HIGHWAYS

In general, each state can determine how its highways may be used, and, as regards intrastate commerce, it may decide what use shall be made of its roads. While no state can prevent the use of its highways by those engaged in interstate commerce, it can prescribe reasonable regulations as to the weight and character of the vehicles that may be used and the speed at which they may be operated. The state may also impose reasonable charges for the use of its roads, and may levy reasonable taxes upon the property that interstate highway carriers employ in rendering

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the services performed in the state. The limitation upon the states in the exercise of these powers is that they may not prevent nor unduly burden interstate commerce.

As regards the regulation of intrastate carriers upon the highways, the power of the states is plenary, subject to the limitations imposed by the Fourteenth Amendment to the United States Constitution that no person shall be deprived of property without due process of law. One limitation imposed upon the states by that amendment is that a private carrier cannot be given the status of a common carrier against his will, merely by legislative fiat. In 1923 Michigan enacted a law regulating common carriers on the highways, requiring them to secure a permit to operate and ordering them to carry indemnity insurance or to file an indemnity bond in an amount to be fixed and approved by the State Public Utilities Commission. The law also provided that "any and all persons . . . engaged . . . in the transportation of persons or property for hire by motor vehicle upon or over the public highways of this state . . . shall be common carriers." The validity of the law was contested in the United States District Court which enjoined the enforcement of the statute; and the decree of the District Court was affirmed by the Supreme Court which held (January 12, 1925) that "it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of private carriage into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."<sup>1</sup>

The Supreme Court was soon required to decide whether, in regulating motor carriers, the states could impose the same regulation upon common and contract carriers. In 1917, California enacted a statute requiring motor common carriers operating between fixed termini within the state to secure a permit from the State Railroad Commission which was empowered to fix the rates charged by such carriers and to regulate their relations

<sup>1</sup> Michigan Public Utilities Commission v. Coral W. Duke, 266 U.S. 570. Duke was engaged in interstate transportation; but the principle announced by the Court would have applied to his case had he been engaged in an intrastate service.



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with the public. Two years later the law, which applied only to intrastate carriers, was amended by making the provisions of the statute applicable alike to common carriers and to carriers of persons or property operating under private contracts of carriage. The Supreme Court of California upheld the law, but the United States Supreme Court, four of the nine judges dissenting, held that, while, "The state has power to prohibit the use of public highways in proper cases," the statute in question was not in a "real sense the regulation of the use of the public highways. It is the regulation of the business of those who are engaged in using them." The law required a private carrier, in order to use the highways, to "submit to the condition of becoming a common carrier and of being regulated as such." This the Court held was a violation of the plaintiff's property rights "as guaranteed by the due process clause of the Fourteenth Amendment."<sup>2</sup>

The decision of the Supreme Court in the Frost Case seemed for a time to prevent the states from the effective regulation of intrastate motor contract carriers; but subsequent decisions of the Court have upheld statutes providing for the thorough regulation of such carriers. It will suffice to refer to the Texas Motor Vehicle Act of 1931 and its interpretation by the Supreme Court of the United States in two important and most instructive decisions. The statute provided that motor common carriers as a condition of operation must secure, from the State Railroad Commission, a *certificate* of public convenience and necessity and that a contract carrier must obtain a *permit* which is not to be granted until the applicant has complied with the requirements of the statute. The size of vehicles that may be used and the maximum load that may be carried are prescribed. The Railroad Commission has the power to fix the rates of common carriers. The Commission can make regulations governing the conditions of competition of contract with common carriers and prescribe minimum rates to be charged by the contract carriers which rates shall not be less than those charged by common carriers for like services. The general purpose of the statute is set forth in a

<sup>2</sup> Frost v. Railroad Commission of the State of California, 271 U.S. 583, decided June 7, 1926.

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“declaration of policy” (see 22b of the law) that admirably states the objective sought to be obtained and may well be quoted:

The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with a public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interests of the general public.

Two suits were brought by interested carriers in the United States District Court for the Southern District of Texas petitioning the Court to enjoin the officers of the state from enforcing the Motor Vehicle Act of 1931 as unconstitutional. In both cases the District Court held the law to be constitutional and refused to enjoin its enforcement. Both cases were taken on appeal to the United States Supreme Court which affirmed both decrees of the lower court.<sup>3</sup> Texas avoided the mistake California had made in placing contract and common carriers in the same category. The Texas law did not attempt to convert contract carriers into, or give them the status of, common carriers. The significant provisions of the Texas statute and the decisions of the Supreme Court interpreting and upholding the statute are considered in Chapter XXI in discussing the regulation of motor carriers by the states.

The Supreme Court has upheld the authority of a state to decide what contract carriers shall be permitted to operate upon the highways and under what conditions, and also to prescribe the minimum rates of such carriers for the purpose of maintain-

<sup>3</sup> *Sproles, et al., v. Binford, et al.*, 286 U.S. 374, decided May 23, 1932. *Stephenson, et al., v. Binford, et al.*, 287 U.S. 251, decided Dec. 5, 1932.

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ing fair competition between them and common carriers upon the highways and upon the railroads.

### AUTHORITY OF THE FEDERAL GOVERNMENT OVER INTERSTATE HIGHWAY CARRIERS

The foregoing paragraphs have outlined the major powers of the states to regulate intrastate motor carriers. The highways are, however, used both by intrastate and interstate carriers, the latter being subject to regulation both by the states and by the United States. The states in the exercise of their general police powers can prescribe reasonable rules and regulations applying to all users of the public highways including those engaged in interstate transportation. As the United States Supreme Court has said :

“This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state’s action is always subject to inquiry insofar as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.”<sup>4</sup>

As has been pointed out, the states may not unduly burden interstate commerce by the requirements exacted of interstate carriers; and, while the states may decide who may use the public highways as carriers for hire in intrastate services, and may prescribe reasonable regulations applying to all users of the highways, the states cannot limit or prevent interstate commerce by denying the use of their highways by interstate carriers.

The State of Washington, in 1921, enacted a statute which prohibited “common carriers for hire from using the highways . . . without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation.” A man by the name of Buck, who was a citizen of Washington, desired permission to operate an auto stage line between Seattle, Washington, and Portland, Oregon. Buck was granted a license by the State of Oregon, but

<sup>4</sup> *Hendrick v. State of Maryland*, 235 U.S. 610, decided Jan. 5, 1915.

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the Director of Public Works of Washington refused to grant him a certificate for the reason that:

under the laws of the State, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to the frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington.

The District Court of the United States for the Western District of Washington was asked to enjoin the enforcement of the statute, but refused to issue an injunction. The Supreme Court reversed the decree of the District Court, and held that, "The provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such action is forbidden by the Commerce Clause."<sup>5</sup>

On the same day that the Supreme Court announced the decision in the Buck Case, it decided that the State of Maryland could not deny the use of its highways to an interstate carrier. George W. Bush and Sons Company desired to do an exclusively interstate business carrying freight over specified highways, and made application to the Public Service Commission for a permit which the Commission, under the state statute of 1922, could grant or could refuse if it was of the opinion that the granting of the permit would be "prejudicial to the welfare and convenience of the public." The Commission considered "whether or not existing lines of transportation would be benefited or prejudiced, and in this way the public interest affected," and denied the applicant the permit requested, although admitting that the highways of the state were not unduly congested and that the applicant would use trucks of the kind and character of those then in use upon the highways. The applicant brought suit in the courts of the state to restrain the state officials from preventing the company from operating its trucks. Both the lower court and the Supreme Court of Maryland refused to enjoin the state officials, and the plaintiff company appealed to the United States Supreme Court which reversed the decree of the state

<sup>5</sup> A. J. Buck v. E. V. Kuykendall, 267 U.S. 307, decided March 2, 1925.

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courts, for the reason that Maryland had, as had the State of Washington in the Buck Case, "invaded a field reserved by the Commerce Clause for Federal regulation."

The highway that Buck proposed to use in Washington had been constructed by the state with the aid of Federal funds, while the Maryland highway in question had been built without United States aid; but the Supreme Court held that this did "not prevent the application of the rule declared in the Buck Case." The court, however, was of the opinion that, while the right to use a state highway for interstate commerce did not depend upon whether Federal aid had been given for the construction of the highway, such aid makes "clear the purpose of Congress that state highways shall be open to interstate commerce."

The power of the Federal Government, under the Commerce Clause of the Constitution, to regulate interstate carriers on the highways is undoubtedly as comprehensive and definite as is its power to regulate interstate railroad carriers. By giving liberal aid to state highway construction, and by stipulating how and with what requirements the Bureau of Public Roads shall distribute the appropriated funds among the states, the Federal Government has brought about the development by the states of a national system of high-class highways that are being largely and increasingly used for interstate transportation by common, contract, and private motor carriers. After having been under consideration for a decade, the Federal regulation of interstate highway carriers for hire was provided for by the Motor Carrier Act approved August 9, 1935, the legislation being one of the results of the labors of the Coördinator of Transportation during his three years of service under the provision of the Emergency Railroad Transportation Act of June 16, 1933. The legislation that has been enacted providing for the adequate regulation of interstate motor carriers, and the manner in which the law is being administered, will be discussed in Chapter XXII.

### AUTHORITY OF THE STATES OVER WATERWAYS AND CARRIERS BY WATER

The "water rights" of rivers belong to the states. The use of the flowing water for irrigation purposes or for the development

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of hydro-electric power is controlled by the states. If the Federal Government constructs, in a non-navigable stream, a dam for the generation of power, such as the Boulder Dam in the Colorado River, the consent of the states whose "water rights" would be affected must first be obtained. A stream that is navigable, or may be made navigable and may be used in interstate commerce, may be declared, by the Federal authorities to be a navigable waterway of the United States; and the National Government can improve the stream for navigation by constructing a dam, if that is necessary, and hydro-electric power may be generated; but, in theory at least, the development and sale of electric power must be incidental. It cannot be the major purpose to be accomplished. Whether a different interpretation of Federal authority under the Constitution may ultimately follow upon the larger program of public works now being carried out remains to be determined.

The states can construct canals and can improve the rivers and lakes within their boundaries to provide additional or better facilities for their commerce; but, if the waterways thus created or improved are open to, and are used by, interstate commerce, the Federal Government, because of its power to regulate interstate commerce, may require the states to carry out their improvements in such manner as not to limit the jurisdiction of the Federal Government.

At ports and harbors the states have jurisdiction over the water-front. The Federal Government can, and usually does, establish the navigable channel to and through the harbors at seaboard and lake ports. Piers or other structures may be built from the shore out to the channel, that is, to the "harbor line," and in general the state, or the board or municipality in which the state may vest its authority, has jurisdiction from the shore to harbor line.

The states have the same jurisdiction over intrastate carriers by water as over other intrastate carriers, and there is also the same limitation upon such jurisdiction as there is upon the power of the states to regulate intrastate railroad transportation. The Federal Government's power to regulate interstate navigation, as was declared by the Supreme Court in *Gibbons v. Ogden*, as

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long ago as 1824, is plenary and cannot be limited by the states. As a matter of fact, however, the Federal Government has thus far regulated interstate carriers by water much less completely than it has regulated the railroads. When the National Government includes, as it eventually will, interstate waterways and carriers in a comprehensive plan of transportation regulation, it will doubtless be necessary for the courts to define more closely than has yet been necessary the boundary between state and Federal authority over intrastate and interstate carriers by water.

There is no question as to the power of the states to tax property located within their borders, including property in facilities employed in interstate transportation. In order to promote shipping and ocean commerce, some states have exempted from taxation the ocean shipping belonging to domestic corporations. The states also have definite and relatively large police powers over commerce and carriers by water, such as sanitary and quarantine regulations, rules as to the speed and the lighting of vessels, and provisions for patrolling the harbor to enforce regulations, protect lives and property, and maintain order.

### AUTHORITY OF THE FEDERAL GOVERNMENT OVER NAVIGABLE WATERWAYS AND INTERSTATE CARRIERS BY WATER

As in the case of the regulation of railroads, the power and authority exercised by the Federal Government, under the Commerce Clause of the Constitution, over interstate waterways and carriers by water has developed with successive decisions by the Government as to practicable measures to be adopted and carried out. Although the Constitution vested in the National Government definite "power to regulate commerce with foreign nations and among the several states," it was several decades before there was much exercise of the power. For some time after the adoption of the Constitution inland commerce was mainly local. Most interstate commerce was carried by the coastwise sailing-vessels then employed in trading. The application of steam to river boats in 1807, the improvement of river channels and the construction of canals during the succeeding twenty-five years,

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and the building of railroads after 1830 increased the possibilities and the importance of interstate commerce, and caused the Federal Government to concern itself with improving and extending inland waterways, with building lighthouses, and with aiding the states in providing their ports with better harbors and better channels thereto. The increase in interstate commerce, and the assistance given by the Government to its development, necessarily led to the public regulation of that commerce. This naturally began with the assumption of Federal authority over interstate navigation, and it was most fortunate that, at the beginning of active government regulation of interstate commerce, the powers of the Federal Government were given broad scope by Chief Justice Marshall in the Supreme Court's decision in *Gibbons v. Ogden*.

The development of inland waterways, and the integration of the facilities of interstate commerce and transportation, would have proceeded more rapidly during the half century following the decision in *Gibbons v. Ogden* had not the dominant political forces felt obliged, mainly for the protection of the institution of slavery, to adhere to a strict construction theory of the Constitution that prevented the Federal Government from carrying on, within a state, "internal improvements" that would have increased the facilities of interstate commerce and would have brought about their better integration into a general transportation system. It was after the Civil War had given a broader meaning to the constitutional powers of the Federal Government that Congress adopted the policy which has since been adhered to and which has year by year been broadened in scope—the policy of improving ocean and lake harbors, improving lake and river channels, and bringing into existence, as far as possible, a national system of waterways that is ultimately to be an integral part of a national transportation system comprising railroads, highways, and airways as well as waterways. This goal has not yet been attained, but it is becoming more and more definitely the objective of all government transportation regulation.

The extent to which Congress has, and has not, exercised its plenary power to regulate interstate transportation by water will be considered in Chapter XIX where the past and present policy



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of the Federal Government, and the principles that should control present and future action, will be discussed.

### GOVERNMENT AUTHORITY OVER CARRIERS BY AIR

The division of authority between the states and the Federal Government over the regulation of transportation and carriers by air is, in general, the same as for other kinds of transportation and carriers. Airways and their use are, however, especially interstate in character. Air transportation services that are strictly intrastate can be of only small importance. The conditions of air transportation are, however, such that exceptional provision must be made for the inspection and government approval of all equipment used and for the examination and licensing of pilots. The regulations as to inspection of equipment and licensing of pilots would naturally come under the authority of the states for intrastate carriers and under the Federal authority for interstate carriers; but the tendency is for the states to require air carriers and pilots to obtain United States certificates and licenses. This is a desirable tendency, because it makes regulation more uniform and increases the safety of air services.

As will be explained in the discussion of state and Federal regulation of air transportation and carriers, both the local and national authorities have provided for the detailed regulation of the equipment and services (but not as yet of the rates) of air carriers. The relation of government, both local and national, to air transportation has, however, been concerned with aiding and promoting the service, even more than with regulation. The first thought of the public has been to help put this novel and promising means of travel and carriage upon a technically successful and commercially profitable basis. When or if that is accomplished, carriers by air will, presumably, be regulated much as are other carriers.

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## CHAPTER VII

### COURT REVIEW OF LEGISLATIVE AND ADMINISTRATIVE REGULATION OF CARRIERS

TRANSPORTATION by railroads and other carriers for hire is regulated by the Government, because the business is vested with a public interest. Transportation is a public utility service. The extent or scope of the actual regulation exercised by the Government will be determined by the policy adopted and by the constitutional and other limits within which the policy may be carried out. Regulation is accomplished by legislation and by the administrative action of commissions established by statute. The validity of legislative enactments and commission regulations, decisions, and orders is determined by the courts which are the interpreters of the Constitution and of the meaning and requirements of statutes. Court review of legislative and administrative action thus has an important place in a discussion of government regulation of carriers.

#### CONSTITUTIONAL BASIS OF COURT REVIEW

Government regulation of railroads and other carriers affects the property rights of those who perform the regulated services. Property rights being rights in equity, legislation regulating the income and making requirements as to the expenditures of carrier corporations raises questions in equity to which only the courts can give final answer. This would be true were the United States Constitution silent on the question, but it is not. The equity rights of the people of the United States that may be affected by Federal legislation are safeguarded by the Fifth Amendment of the Constitution of the United States which provides, in part, that, "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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Similar protection of equity rights as they may be affected by legislation of the states is afforded by the first section of the Fourteenth Amendment to the Federal Constitution, the latter part of which reads "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The significance of the right to "due process of law" will be indicated presently when some relevant decisions of the United States Supreme Court are referred to.

Railroad and other carriers are subject both to the general regulatory statutes of the Federal Government and the states, and also to the antitrust or antimonopoly laws that Congress has applied to all corporations engaged in interstate commerce and that the states have made applicable to intrastate commerce. As railroad regulation has become more comprehensive and effective, and as the service advantages and operating economies of the coördination and consolidation of many small systems into a lesser number of large systems has become evident, the railroads have been exempted by the Federal Government from the provisions of the antitrust laws insofar as that was necessary to enable two or more competing railroads to consolidate or merge when such action was approved by the Interstate Commerce Commission.

The states and the Federal Government regulate carriers by legislation and by administrative commissions. All laws, whether state or Federal, are valid only when they are consonant with the provisions of the United States Constitution; and, as the Federal courts are the interpreters of the Constitution, it is the Supreme Court of the United States that must finally decide what legislative regulation of carriers is possible under the Constitution. The state and Federal regulatory commissions have such powers as have been granted them by statute. The validity of an action taken by a commission is thus subject to two tests. The statutory authority upon which the commission's action is based must be one that the legislature may constitutionally grant, and the commission's procedure and action must be in accordance with the requirements of the statute from which the commission derives its powers. Thus court review reaches to the determina-

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tion of the constitutionality of legislation enacted to regulate carriers, and to both the constitutionality and the legality of the decisions and orders of regulatory commissions.

As has been pointed out in a previous chapter, the legislative power of the states to regulate railroads was established by the decisions of the Supreme Court upholding the Granger Laws. In those decisions, the Court upheld the validity of state legislation fixing reasonable rates to be charged by those engaged in a business vested with a public interest; and railroad transportation was held to be such a business. When the Granger Cases were heard by the Supreme Court, the interested carriers contended that the courts and not the legislature could decide what railroad rates were reasonable; but the answer of the Court was, in effect, that the authority to fix the rates of common carriers is inherent in the legislative power of the state, and that the state does not divest itself of that power when it grants to a corporation a charter authorizing the corporation to make reasonable charges for its services. Indeed, the Court, in deciding the *Peik Case*,<sup>1</sup> went so far in upholding the regulatory power of the legislature as apparently to renounce its power to question the reasonableness of the rates that had been fixed by the legislature. That this was not, in fact, the intention of the Court was later made clear when the Court was compelled to decide whether to take jurisdiction over a case involving the constitutionality of a state law vesting in a railroad commission authority to regulate railroads and to revise their tariffs of charges.

### DEVELOPMENT OF COURT REVIEW

It was in deciding the case just referred to that the Supreme Court of the United States first definitely asserted that the courts could review action by a state fixing railroad rates. The State of Mississippi, in 1884, had enacted a law providing for the regulation of railroad rates by a commission created by the statute. Action was brought by the Farmers Loan and Trust Company of New York to secure an injunction preventing the Mississippi Railroad Commission from enforcing the law against the Mobile

<sup>1</sup> *Peik v. Chicago and Northwestern Railway Co.*, 94 U.S. 178 (at p. 179). See *supra* Chap. v, p. 66.

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and Ohio Railroad.<sup>2</sup> The case reached the Supreme Court upon appeal from the Circuit Court of the United States for the Southern District of Mississippi and the injunction was denied. The Supreme Court decided, as it had in the Granger Cases, that while the state had, by the charter granted to the railroad company, given the company the right to fix reasonable charges, the state had not surrendered "the power of declaring what shall be deemed reasonable." The statement of this conclusion in the Court's decision is followed by the pronouncement of special significance in the present discussion that:

From what has been said it is not to be inferred that this power of limitation or regulation is itself without limits. This power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation. Under the pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.

The Court was not called upon to pass upon the reasonableness of rates, as the Commission had not fixed rates applying to the railroad in whose interest an injunction was sought; but the Court definitely announced its power of review, and stated that "when the Commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions [of the statute]."

Four years later the Supreme Court of the United States held invalid a provision of a law that had been enacted by the State of Minnesota, in 1887, that made the decision of the State Railroad and Warehouse Commission final and conclusive as to rates that a railroad might charge. The statute as interpreted by the Supreme Court of the state was held to mean "that the rates recommended and published by the Commission . . . should be final and conclusive as to what are lawful or equal and reasonable charges." The state Supreme Court held that inasmuch as the legislature had the power to regulate railroad rates, it could endow the Commission with authority to fix such charges and

<sup>2</sup> John M. Stone, *et al.*, composing the Railroad Commission of Mississippi, *v. Farmers Loan and Trust Co.*, 116 U.S. 307-347, decided January 4, 1886.

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could make the Commission's decision final and conclusive as to what charges were reasonable. The Supreme Court of the United States accepted the state Supreme Court's interpretation of the law, but reversed the decree of the state court that had issued a writ of mandamus ordering the Chicago, Milwaukee and St. Paul Railway Company to comply with the order of the state commission.<sup>3</sup> The view expressed by the Supreme Court of the United States was that:

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and insofar as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

That the right to obtain a court review of state-made railroad rates does not end with the state courts but extends to the United States courts was established, in 1898, by the decision of the Supreme Court of the United States in the much quoted decision of the case of *Smyth v. Ames*.<sup>4</sup> In 1893 the State of Nebraska enacted a law containing a schedule of reasonable maximum railroad rates, creating a Board of Transportation, and giving it the power "to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said board." The Act provided that, if any railroad considered the rates thus fixed to be unreasonable, the railroad might bring action in the Supreme Court of the state for an order requiring the Board of Transportation to raise

<sup>3</sup> *Chicago, Milwaukee and St. Paul Railway Co. v. State of Minnesota*, 134 U.S. 418-466, decided March 24, 1890.

<sup>4</sup> *Constantine J. Smyth, Attorney-General, et al., constituting the Board of Transportation of Nebraska, et al., v. Oliver Ames*, 169 U.S. 466, decided Mar. 7, 1898. There were really three cases involving the same issue and decided by one opinion of the Court. The other cases were *Smyth v. Smith* and *Smyth v. Higginson*.

## GOVERNMENT REGULATION OF TRANSPORTATION

the rates to any sum in its discretion, but not higher than the rates were in January, 1893. Non-residents of Nebraska, who were stockholders of the Union Pacific and other railroad companies in Nebraska, brought suit in the United States courts to enjoin the railroad companies from making the schedule of rates prescribed by the statute, and to restrain the Board of Transportation from enforcing the statute, the courts being petitioned to adjudge the state law to be void. The case reached the United States Supreme Court on appeal from the United States Circuit Court which had issued the injunction sought by the plaintiffs. The Supreme Court affirmed the decree of the lower court.

The question with which we are here concerned was whether it was within the power of the United States courts to take jurisdiction and pass upon the Nebraska statute. The law had given the carriers subject to the act the right to appeal to the Supreme Court of the state. Did this not make the statute comply with the finding of the United States Supreme Court in the Minnesota Rate Case, in 1890, that the reasonableness of rates was a question to be determined by the courts? The Supreme Court of the United States held that the circuit court could assume jurisdiction, the opinion of the Supreme Court being:

The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of a particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court. . . . The plaintiff . . . may invoke the equity powers of the proper circuit court of the United States when jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction.

It may be added that the Supreme Court in exercising jurisdiction to review action of the state held that the Nebraska law had fixed railroad rates unreasonably low, and "that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution."



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In 1908, ten years after the case of *Smyth v. Ames* was decided, the Supreme Court, in *Ex Parte Young*,<sup>5</sup> held that the Federal courts have original jurisdiction to hear cases involving the constitutional rights of those subject to state-made railroad rates. While the carriers or the stockholders may institute equity proceedings in the courts of the state that has enacted a regulatory law, to determine the validity of the statute, the plaintiffs may, if they choose to do so, bring suit in a Federal court, which has original as well as appellate jurisdiction. The Railroad and Warehouse Commission of Minnesota in 1906 prescribed a schedule of maximum merchandise railroad freight rates, which the railroad companies put into effect. On April 4, 1907, the legislature of Minnesota passed a law fixing railroad passenger fares in the state at two cents a mile; but on April 18, 1907, the legislature divided certain freight commodities into seven classes and fixed maximum rates for each class when transported in carloads of designated minimum weights; and this order the carriers did not carry out. The act was to become effective June 1, 1907, but on the preceding day nine suits in equity were begun in the Circuit Court of the United States for the District of Minnesota. The suits were brought by stockholders of one of the railroads to prevent the statutory rates from being put into effect by the railroads, and the defendants were the railroad companies, the Railroad and Warehouse Commission, and the attorney-general of the state, Edward T. Young. The Circuit Court issued a temporary order restraining the railroad company named in the bill before the court from putting into effect the rates fixed in the Act of April 18, 1907, and also restraining Attorney-General Young from taking steps to enforce the act of the legislature. Young averred that the suit that had been brought against him as attorney-general was in truth a suit brought against the State of Minnesota by a citizen of another state and was thus a suit to which, by the Eleventh Amendment to the United States Constitution, the judicial power of the United States did not extend. Young's motion to dismiss the suit against him having been overruled by the Circuit Court, he later, September 23, 1907, filed a demurrer which was also overruled and the injunction against

<sup>5</sup> 209 U.S. 123, decided March 23, 1908.

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him was not removed; whereupon Young violated the injunction of the United States Circuit Court by applying to the courts of the state to issue a writ ordering the Northern Pacific Railway Company to put into effect the rates established by the state legislature. After having been given a hearing by the United States Court, Young was adjudged to be in contempt.

The foregoing case came on appeal to the Supreme Court of the United States which upheld the Circuit Court in assuming jurisdiction. In its opinion, the Supreme Court stated, concerning railroad rates fixed by the states, that:

The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. . . .

We conclude that the Circuit Court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.

The decision of the United States Supreme Court in *Ex Parte Young* is also of great significance because it not only upheld the Circuit Court in taking jurisdiction, but also because the Supreme Court emphasized the value of proceedings in equity to determine whether rates fixed by a state should or should not go into effect. As the Court stated in its opinion:

To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, to obtain a review in this court by a writ of error to the highest state court, would place the company in peril of large loss and its agents in a great risk of fines and imprisonment if it should finally be determined that the act was valid. This risk the company ought not to be required to take. . . .

All the objections to a remedy at law as being plainly inadequate are obviated by a suit of equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the Act until the decision of the court upon the legal question.

## COURT REVIEW OF FEDERAL REGULATION

The court review of Federal regulation of transportation by Congress and the Interstate Commerce Commission has been concerned in part with defining the scope of Federal authority and with marking the boundary between the jurisdictions of the Na-

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tional Government and the states. This phase of court review has been considered in the preceding chapters. For the most part, legislation by Congress has been general in character and has embodied principles and requirements to be applied to the regulated carriers by the Interstate Commerce Commission by administrative action taken in the exercise of its discretion as to the meaning of the statute and as to what rates and rules are reasonable. Congress has not fixed transportation rates, hence its legislation, except when interpreted and applied by the Interstate Commerce Commission, has not raised questions as to the violation of the Fifth Amendment to the United States Constitution.

One act of Congress, the Adamson Law, establishing a standard eight-hour day for railway labor and providing that the wages being paid September 1, 1916, should not be lowered by the carriers during the succeeding nine months while the question of an extra rate of pay for overtime was being investigated, took Federal legislation into a new field and the constitutionality of the Act was challenged by the carriers who brought suit in the Federal courts to have the law set aside. By a very close decision, the Supreme Court being divided five to four, the Court decided that Congress had not exceeded its authority and the eight-hour day has since been the standard in the railway service.<sup>6</sup>

The review by the Federal courts of the decisions and orders of the Interstate Commerce Commission has dealt with many questions and has resulted in the development of a comprehensive code of Federal regulation of interstate carriers. As has been stated, the courts can pass upon the constitutionality and the legality of the acts of the Interstate Commerce Commission. The Commission, in administering the Interstate Commerce Act, may give the law a scope and meaning violative of the Federal Constitution, or the Commission procedure may not be in accordance with the requirements of the law, or its findings may, conceivably, not be such as are warranted by the facts upon which they are based. The courts have, however, especially since the enactment of the Hepburn Act of 1906 giving the Interstate Commerce Commission power to fix railroad rates, been careful not to substitute their judgment for that of the Commission as to the interpretation of the facts. The

<sup>6</sup> *Wilson v. New*, 243 U.S. 332, decided March 19, 1917.

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policy of the courts in reviewing decisions of the Interstate Commerce Commission was definitely enunciated in 1910 by Chief Justice White as follows:

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and *c*, . . . whether . . . the order . . . is within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power. [This definition of the court's functions was summarized by the statement that] Power to make the order and not the mere expediency or wisdom of having made it, is the question.<sup>7</sup>

Two years later, in another decision, the Supreme Court set forth specifically and categorically the doctrine of review that had been established and by which it was controlled in passing upon the orders of the Interstate Commerce Commission.<sup>8</sup>

. . . it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power.

The court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or inexpediency of the order, or whether, on like testimony, it would have made a similar ruling.

Without this interpretation of the power of the courts to review the decisions of the Interstate Commerce Commission, the Commission could not have become the effective administrative body

<sup>7</sup> Interstate Commerce Commission *v.* Illinois Central Railroad Co., 215 U.S. 452, decided in 1910.

<sup>8</sup> Interstate Commerce Commission *v.* Union Pacific Railroad Co., 222 U.S. 541, decided Jan. 9, 1912.

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that Congress intended it to be. If the Federal courts, in reviewing Commission orders, had continued the practice they followed prior to 1906 of receiving and giving consideration to testimony that had not been presented to the Commission, the administrative regulation of railroads and other carriers would have been impossible.

By one other interpretation of their powers the courts have given vitality and force to the regulative authority of the Commission. The courts have ruled that the Commission has primary jurisdiction to hear complaints involving alleged violation of the Interstate Commerce Act. While that law provides "that any person or persons claiming to be damaged by a common carrier subject to this act may either make complaint to the Commission . . . or may bring suit on his or her own behalf for the recovery of damages . . . but . . . shall not have the right to pursue both of said remedies," the Supreme Court, as early as 1907, held "this clause . . . cannot in reason be construed as continuing in shippers a common law right, the continuance of which would be absolutely inconsistent with the provisions of the Act."<sup>9</sup> In the same decision the Court stated:

Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future . . . if the power was left in courts to grant relief on complaint of any shipper. . . . If the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a Court . . . and thus a conflict would arise which would render the enforcement of the act impossible.

By holding consistently to the doctrine that all questions over which Congress has given the Commission jurisdiction must first be decided by the Commission, and by limiting court review of the Commission's actions to consideration of the constitutionality and legality of the Commission's orders, the courts have given the Commission the jurisdiction and the authority that have made possible the great work that has been accomplished by the Commission.

<sup>9</sup> *Texas and Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426.

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Almost from the beginning of the Commission's activities in interpreting and carrying out the acts of Congress regulating interstate carriers, appeals have been made from its decisions and orders. The courts are frequently appealed to for injunctions against the enforcement of the Commission's orders; but there has been no adverse decision of the Supreme Court of the United States as to the constitutionality of legislation or of an administrative order of the Commission. It has been the legality of the Commission's actions that has been subject to review in the courts, and the questions reviewed have covered many phases of the Commission's activities and findings. Reference to a few important decisions of the Supreme Court will serve to indicate the far-reaching effect court review has had upon the development of the legislative and administrative regulation of transportation.

A decision of the Supreme Court rendered March 30, 1896, had a large effect upon the Interstate Commerce Commission's powers, and upon later congressional legislation. By the Act of 1887, the railroads were prohibited from charging rates that were unreasonable or unjustly discriminatory; and, upon complaint of shippers, the Commission was to decide whether the carriers' rates were reasonable and just. For a time after the Act went into effect, the Commission, in deciding what rates were unreasonable or unjustly discriminatory, named the rates that were reasonable and just and ordered the carriers to put such rates into effect. Under the Act of 1887, however, the orders of the Commission were not binding upon the carriers who could, if they chose to do so, refuse to obey an order unless the Commission took them into court and received a decree requiring obedience. In 1891, the Commission ordered the Cincinnati, New Orleans and Texas Pacific Railway Company to cease charging a higher rate from Cincinnati to Social Circle, Georgia, than to Augusta which was 119 miles farther from Cincinnati. The Commission also fixed a rate from Cincinnati to Atlanta that was somewhat less than the rate to the more distant city of Augusta. The railroad company did not obey the order and the Commission brought suit in the United States District Court for the Northern District of Georgia for a decree requiring the railroad company to observe the Commission's order. The District Court denied the petition and dismissed the bill; but

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upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit, the decree of the District Court was reversed and the case was remanded to the District Court to order the railroad company to cease charging more for the shorter haul to Social Circle than for the longer haul to Augusta. The case was taken to the Supreme Court which affirmed the decree of the Court of Appeals. It will be noted that none of the three courts upheld the order of the Commission fixing rates that the carrier must charge. Upon this question the Supreme Court stated,<sup>10</sup> "We do not find any provision of the [interstate commerce] act that expressly or by necessary implication confers such power." In another decision<sup>11</sup> rendered the following year the Supreme Court was more specific in denying to the Commission power under the Act of 1887 to fix rates, the statement being that "Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates." Thus until Congress adopted the Hepburn Act of 1906, the Interstate Commerce Commission was without authority to regulate railroad rates.

Another important limitation was placed upon the Commission's authority by the decision of the Supreme Court in the Alabama Midland Railway Case, in 1897. The fourth section of the Act of 1887, the long-and-short-haul section, prohibited the railroads, except upon authorization by the Commission, from charging more, "under similar circumstances and conditions," for a short haul than for a longer haul, the shorter haul being included within the longer and in the same direction. The general practice of the railroads was to charge less to an important traffic point, where they competed with each other or with carriers by water, than they charged to local non-competitive points which were often intermediate between the places from which traffic was shipped and the competitive points of destination. The Commission early decided that the competition of railways with each other at one point and not at another did not create dissimilar circumstances and conditions between the two points; but that the competition of railways with waterways (carriers

<sup>10</sup> *Cincinnati, New Orleans and Texas Pacific Railway Co. v. Interstate Commerce Commission*, 162 U.S. 184. This is known as the Social Circle Case.

<sup>11</sup> *Interstate Commerce Commission v. Alabama Midland Railway Co.*, 168 U.S. 144, decided Nov. 8, 1897.

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by water not being subject to regulation under the Interstate Commerce Act) and the absence of such competition at other points did create unlike conditions that exempted the carriers from the requirements of the long-and-short-haul section of the act. However, the courts put a different interpretation upon the fourth section and held, in deciding the Alabama Midland Railway Case, "that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line."

The court, thus, did not distinguish inter-railway competition from railway-waterway competition, but held that discriminations in railway rates might be justified by inter-railway competition. Inasmuch as the major cause of discriminations in railroad rates was the competition of railroads with each other, the interpretation given the fourth section of the Interstate Commerce Act, together with the decision that the Commission did not have authority to fix the rates to be charged, practically nullified the power of the Commission to regulate railroads until its powers were increased by additional legislation. By the Mann-Elkins Act of 1910, the observance of the fourth section was made mandatory. The phrase "under substantially similar circumstances and conditions" was taken out of the section, and carriers could be relieved from the requirements of the section only upon applying to the Commission and obtaining its permission. The Hepburn Act of 1906 and the Mann-Elkins Act of 1910, by giving the Commission control over interstate railroad rates, made the Commission an effective regulatory body whose large powers have been increased by several statutes enacted since 1910.

The cases just referred to are among those in which the decisions of the Supreme Court gave the Interstate Commerce Act an interpretation that greatly narrowed the powers of the Commission until the effects of court review were changed by congressional legislation. Other decisions of the Federal courts have so defined the provisions of the acts of Congress as greatly to enlarge the Commission's powers. Typical of such decisions was



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the one in the Shreveport Case,<sup>12</sup> referred to in the previous chapter, which validated an order of the Commission that caused the railroad carriers concerned to change state-made intrastate rates to remove an unreasonable discrimination against interstate rates that had been found reasonable by the Interstate Commerce Commission. Of even greater and more far-reaching importance in increasing the regulatory authority of the Federal Commission were the decisions of the Supreme Court in the Wisconsin and New York rate cases,<sup>13</sup> which, in effect, require the states in regulating all intrastate rates to avoid fixing such rates below levels that have been found by the Federal Commission to be reasonable for interstate rates. The states may not unduly burden interstate commerce, and the Interstate Commerce Commission is the judge as to what may constitute such undue burden.

## GENERAL CONCLUSIONS

The original Interstate Commerce Act of 1887 was legislation in a new and unexplored field, and it is not surprising that it failed to give the Commission powers that were sufficiently definite and adequate to accomplish the task assigned to it. The defects and shortcomings in the Act of 1887 were revealed by a series of decisions by the Federal courts, the most important of which have been referred to in the foregoing discussion. As these decisions, one after another, narrowed the jurisdiction and powers of the Interstate Commerce Commission, the courts were regarded by many as obstructing the Commission and preventing the effective regulation of the railroads.

While the bill that became the Mann-Elkins Act of 1910 was being considered in the Senate there was a debate over the possibility and desirability of limiting by statute the field and scope of judicial review of the decisions of the Interstate Commerce Commission. The result of the discussion was a decision that it was not practicable to frame a statute defining the field within which court review must be kept. The Constitution provides

<sup>12</sup> *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342.

<sup>13</sup> *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy R. R. Co.*, 257 U.S. 563; and *State of New York v. U.S.*, *et al.*, 257 U.S. 591.

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that, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish"; and, as the Supreme Court declared not long after the Mann-Elkins Act became a law, the judicial power of the United States is placed by the Constitution in the Supreme Court and other courts that Congress may establish. The courts, not Congress, can define the judicial power and, whatever the power is, it can be exercised by the courts without limitations imposed upon them by Congress.

After Congress gave the Interstate Commerce Commission definite authority, by the Hepburn Act of 1906, to fix railroad rates, and to exercise effective regulatory powers, all the Federal courts have carefully followed the Supreme Court in not questioning the wisdom or expediency of the orders of the Commission. In 1910, in the Illinois Central Case before referred to, the Supreme Court stated that "in determining whether an order of the Commission shall be suspended or set aside . . . power to make the order, and not the mere expediency or wisdom of having made it, is the question,"<sup>14</sup> and in 1914 the Court, in the Los Angeles Switching Case, made it clear that it would not "substitute its judgment for that of the Commission upon matters of fact within the Commission's province."<sup>15</sup> By adherence to this policy and by insisting that the Commission shall have primary jurisdiction to determine the rights and obligations of those subject to regulation by the Interstate Commerce Act, the courts have strengthened and broadened the regulatory powers of the Commission.

Court review has been a public benefit. The criticism that has been made of the courts for "interfering" with the regulation of carriers by the state legislatures and Congress has been misdirected. The courts are the constitutional guardians of the powers of the legislatures and of the rights of those affected by legislation. The courts are as vital a part of government as is the legislature, and they are possibly less likely to err in judgment.

<sup>14</sup> 215 U.S. 452 (at p. 470).

<sup>15</sup> Interstate Commerce Commission *et al.*, v. Atchison, Topeka and Santa Fe Railway Co., 234 U.S. 294 (at p. 314).

## COURT REVIEW

The courts in their exercise of judicial review have laid the foundations upon which the effective legislative and administrative regulation of transportation has been based.

## REFERENCES

The Supreme Court decisions referred to in the text and other decisions dealing with the subject are the original sources of information.

Dickinson, John, *Justice and the Supremacy of Law in the United States* (1927).

Johnson, E. R., and Van Metre, T. W., *Principles of Railroad Transportation* (1921), Chap. xxx, "The Courts and Railroad Regulation."

Sharfman, I. L., *The Interstate Commerce Commission* (1931), Part Two, pp. 384-452. This is an excellent discussion of "The Commission and the Courts" with numerous quotations from court decisions.

## CHAPTER VIII

### AGENCIES BY WHICH TRANSPORTATION IS REGULATED

THE regulation of transportation is a task of administration performed by agencies usually designated boards or commissions. Regulation begins with legislation establishing standards and setting forth requirements to be observed and obeyed by the classes of carriers enumerated in the statute. The interpretation of the statute and its administrative enforcement are vested by the legislature in a board or commission, which exercises its authority subject to review by the courts of questions that may arise as to the constitutionality of the statute and the legality of administrative procedure and orders. The board or commission is the organ by and through which the legislature seeks to accomplish its purpose, and is thus a part of the legislative, rather than the executive, branch of the Government; but, like all the legislative and executive parts of the Government, the board or commission functions subject to judicial review of the validity of its acts.

Transportation and carriers by rail, highway, water, and air are at present aided and regulated by several agencies of the Federal Government. It is a complicated scheme that has resulted from piecemeal legislation that, until the Motor Carrier Act of 1935 was enacted, added a new regulatory agency as one kind of transportation after another was brought fully or partially within the field of government aid or regulation. As one views in retrospect past legislation concerning the regulation of transportation, the query naturally arises: why should not transportation by railroads, highways, waterways, and airways have been regarded as one general service comprising several inter-related parts, or as one group of integrated services performed by carriers all subject, or appropriately subject, to the same general principles and policy of government regulation carried out and administered by one authority organized and function-

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alized for the efficient performance of the task of accomplishing the harmonious and unified regulation of all agencies of interstate transportation? If the public had had this concept of transportation and of government regulation, presumably the Interstate Commerce Commission, which was established in 1887 to regulate the railroads, would have been developed into an organization for the regulation of all the agencies of interstate transportation, and we would now be much farther on the road to the goal of coördinated and adequate transportation regulation.

The states have developed their railroad commissions into public utility, public service, corporation, or commerce commissions which, in most states, have been given jurisdiction over intrastate carriers upon the highways. The majority of the states regulate intrastate carriers by water, the agency of regulation being the public utility, or public service, or commerce commission. The practice of the several states varies as regards the regulation of carriers by air. The majority of the states have laws defining the obligations of air carriers, the administration of the laws and the making of necessary rules and regulations being entrusted to a special supervisory tribunal. A few states regulate the services and rates of air carriers for hire, the regulation being exercised by the commission having authority over other intrastate carriers.

The scope and character of state and Federal regulation of transportation and carriers by railroad, waterway, highway, and air will be set forth and discussed for each class of carriers in turn in successive parts of this treatise; the present chapter is confined to a description of the state and Federal agencies of regulation.

### STATE AND FEDERAL AGENCIES FOR THE REGULATION OF RAILROADS

With the exception of Delaware, each state has an administrative agency for the regulation of railroads. As the regulation of railroads preceded the regulation of other kinds of carriers and other public utilities, the first agencies created were railroad

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commissions and this designation has been retained by twelve states, although the commissions may have been given jurisdiction over non-railroad carriers and other public utilities. Eleven states have public utility commissions; fourteen states have public service commissions; while five states place the regulation of railroads under corporation commissions. Illinois has a commerce commission; Oregon a public commissioner; the State of Washington a department of public works; Kentucky a state tax commission; West Virginia a state road commission. As will be noted later, some of the states have highway commissions in addition to the commission or agency that regulates railroads and other public utilities.

While several different titles are given to the agencies by which the states regulate railroads, they all have much the same powers and duties. These powers and the scope of the regulation of railroads by the states, as was noted in discussing court review, have been narrowed somewhat by the decisions of the courts and by the Transportation Act of 1920. However, subject to the limitation that the states in regulating intrastate transportation and carriers may not limit the regulation of interstate carriers by the United States and may not, by fixing intrastate rates and fares on a level lower than that fixed by the Federal Government, place an undue burden on interstate commerce, the states may, and most of them do, subject intrastate transportation and carriers to detailed regulation.

The agency for the Federal regulation of interstate railroad and motor transportation is the Interstate Commerce Commission. As the scope of regulation has been broadened by successive laws of Congress enacted over a long period, the powers and duties of the Commission have been increased until it has become a body with many responsibilities, and, fortunately, with an organization appropriately subdivided and functionalized with reference to the tasks it has to perform. Complaints and administrative matters requiring action come to the Commission by way of the secretary's office and are referred thence to the appropriate member or bureau of the Commission. There are eleven members and six divisions of the Commission, each division being in charge of three or more commissioners, some mem-

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bers serving on more than one division. There are fourteen administrative bureaus, each having its requisite staff headed by a director or chief. Each bureau is under the general supervision of a commissioner or a division. Each member of the Commission has several classes of duties; he participates in the hearings and deliberations in which the Commission functions as a single body; as a member of one or more of the six divisions of the Commission he shares in hearing and deciding the cases, arising under the Interstate Commerce Act, as they are allocated to the division or divisions of which he is a part; each commissioner has delegated to him certain administrative and procedural matters that do not come within the fields covered by the several bureaus; and he may have supervision of one or more of the Commission's bureaus. The *bureau of motor carriers* is responsible to Division Five of the Commission.

A brief reference to the work of each bureau will indicate the scope and character of the Commission's administrative regulation of the railroads and other carriers subject to Part One of the Interstate Commerce Act. A discussion of the government regulation of railroads and other transportation agencies is contained in chapters that follow. The Commission's organization for the regulation of motor carriers under the Act of 1935 will be discussed in Chapter XXII.

Two prerequisites of any intelligent and effective regulation of railroads or any other class of carriers are: (1) adequate and uniform statistical records and reports, and (2) a uniform system of accounts and financial reports. Under the original Interstate Commerce Act, the Commission was able to require carriers to make regular statistical reports based upon a prescribed system, and thus a *bureau of statistics* was early a part of the Commission's organization. The prescribing of a uniform system of accounting to be adhered to by carriers subject to the Commission had to wait until after the passage of the Hepburn Act which gave the Commission authority to maintain in the field a force of inspectors of the accounts of carriers. Since then the *bureau of accounts* has developed and enforced an excellent system of accounts and accounting reports and has handled the problem of depreciation accounting required of the carriers by

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the Commission. Accounting is receiving such additional attention by the Commission that in September, 1937, the Commission established a new division, number six—the Accounting Division—which will be concerned with the revision of railroad accounts, and with the further development of the accounting systems of water lines and motor carriers.

Tariff matters are handled by the *bureau of traffic*. All railroads are required to publish and file with the Commission all their tariffs according to forms prescribed by the Bureau of Traffic, which bureau also deals with freight classification questions. There are two boards within the bureau's organization, one which considers whether tariffs as filed should go into effect or whether the Commission should suspend them until a hearing has been given complainants, and another board, the fourth-section board, that considers and makes recommendations to the Commission concerning applications of carriers for waiver of the requirements of the long-and-short-haul clause of the Interstate Commerce Act.

The *bureau of safety*, as its title would indicate, is concerned with the enforcement of legislation and Commission regulations regarding safety appliances, signals and train control, hours of service, and the investigation of accidents. There is also a *bureau of locomotive inspection* with an appropriate staff of inspectors. Another organization, the *bureau of service*, has jurisdiction over questions concerning car service (distribution of cars), efficiency and economy of railroad operation, rules governing the transportation of explosives and other dangerous articles.

When, in 1913, Congress required the Commission to make a valuation of railroads the *bureau of valuation* was established. For many years, this colossal task caused the Bureau of Valuation to be greater than all the rest of the Commission's organization in size of staff and in necessary expenditures. The original valuation' having been completed in 1933, the present task of the bureau is the relatively small one of bringing original valuations down to date.

One of the most important bureaus is the *bureau of finance* created to carry out those provisions of the Transportation Act of 1920 that required the Commission's approval of new rail-



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road construction and of the securities issued by railroads to obtain new capital or to refund existing obligations, or to reorganize the capital structure. The abandonment of an existing railroad line must also receive the Commission's permission.

The euphonious title of *bureau of inquiry* is given to the one whose agents and attorneys enforce the criminal and penal provisions of the act against shippers or carriers that may indulge in such illegal practices as false billing or weighing of freight, charging other than the published rate, or granting or obtaining by devious means unlawful rebates or discriminations. The enforcement of the Commission's orders, or their defense in the courts, is the duty of the *bureau of law*, the chairman of which has the title of Chief Counsel and is the Commission's legal adviser.

The complaints that come to the Commission are of two general categories, formal and informal. The formal complaints require hearings and decisions. The formal cases are docketed and referred to the several divisions of the Commission and hearings are held by the three members of a division. Some are conducted by an individual commissioner, while the majority of the hearings, which are held in different parts of the country, are conducted by examiners in the service of the Commission who take the testimony and prepare a tentative report for consideration by the appropriate division of the Commission. The *bureau of formal cases* has charge of the docketing and hearing of the formal complaints, and the bureau includes the Commission's staff of examiners which has a committee that reviews the proposed reports of individual examiners before they are submitted to the Commission.

By far the larger number of complaints reaching the Commission are of an informal character and are handled by the *bureau of informal cases*. This bureau also acts upon applications of carriers for authority to refund to shippers a part of amounts that may have been collected under published tariffs, but which are admitted by the carriers to have been unreasonable. The Bureau of Informal Cases also disposes of many thousands of minor matters not classified as complaints, and it gives information and rulings upon request of the public or the carriers.

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To perform the duties placed upon it by the Air Transport Act approved June 12, 1934, the Commission has established a *bureau of air mail*. The act of Congress empowers and directs the Commission after notice and hearing to fix the rates for transporting air mail over each route, the rates thus fixed not to be in excess of the rates provided for in the act. The rates thus fixed by the Commission are to be reviewed by it each year.

This somewhat detailed though very brief statement of the Interstate Commerce Commission's organization shows that the Commission has a wide range of duties connected with the regulation of railroad carriers. The regulation of highway carriers has, by the Act of 1935, been placed in charge of the Interstate Commerce Commission, which has created a new organization concerned solely with the regulation of interstate motor carriers. Eventually the Commission will include four interrelated organizations, the two now concerned with the regulation of carriers by railroad and by highways, a third having to do with carriers by water, and a fourth with authority over air carriers. The administrative problem of so integrating the enlarged commission and coördinated authorities as to give them unity and efficiency of action will be a difficult one, but one that can doubtless be satisfactorily solved.

In addition to the Interstate Commerce Commission there are three boards that participate in regulating the railroads. They are the National Mediation Board, the National Railroad Adjustment Board, and the Railroad Retirement Board. The first two, which have to do with the adjustment, mediation, and arbitration of railroad labor disputes, derive their power from the Railway Labor Act of 1926, as amended by the Railway Labor Act approved June 21, 1934; while the third one was created by the Railroad Retirement Act, approved August 29, 1935, and subsequently replaced by an act approved in July, 1937. The general administration of the Railway Labor Act is intrusted to the National Mediation Board. The Act requires the carriers and their employees to seek to settle disputes by conference of representatives, the employees being free to organize and to select their representatives. The law provides that if the parties con-

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cerned are not able to reach an agreement in settlement of a dispute growing out of grievances or the interpretation of agreements concerning rates of pay, rules, or working conditions, either party may bring the dispute before the appropriate division of the Adjustment Board. This National Adjustment Board consists of 36 members, half being selected by the carriers and half by "such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions . . . of this Act." This large board is subdivided into, and is in fact composed of, four "divisions," each division having jurisdiction over disputes involving designated classes of employees. Each of the first three divisions has ten members—five representing the carriers and five "designated by the national labor organizations of the employees"—while the fourth division has six members, three for the employers and three for the employees. The awards of the several divisions of the Adjustment Board are binding upon both parties to a dispute. The carriers are required to carry out the awards, and if the payment of a money award by the carrier is involved the board fixes the date within which the payment shall be made. If the carrier does not comply with the order, any person for whose benefit the order was made may petition a district court of the United States for a decree compelling compliance with the order.

The duties of the Mediation Board are to seek by mediation to bring parties in dispute to an agreement and, if that is not possible, to persuade the parties to agree to the arbitration of their controversy in accordance with the provisions of the Railway Labor Act. If a settlement cannot be reached by mediation and if arbitration is refused, the Mediation Board, under the terms of the Railway Labor Act of 1926, shall notify the President who may appoint a special board to investigate and to report concerning the dispute; and "after the creation of such board and for thirty days after such board has made its report to the President, no changes, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." The decisions reached by the special board appointed by the President are not binding upon the parties in

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controversy and cannot be enforced by court procedure; but experience has shown that public opinion has been effective in causing the disputants to accept the findings of the special boards that have been appointed by the President. It is many years since there has been a railroad strike.

The Railroad Retirement Board was created by the Railroad Retirement Act, "for the purpose," as the act states, "of providing adequately for the satisfactory retirement of aged employes and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employes in the service of the carriers." The provisions and results of this law and of the Railway Labor Act as amended to date will be discussed in Chapter XI.

### STATE AND FEDERAL AGENCIES FOR THE REGULATION OF CARRIERS BY WATER

Having described in some detail the agencies by which the Federal Government regulates the interstate carriers by railroad, a briefer account may be given of the several other agencies by which the states and the National Government regulate transportation and carriers by water, highway, and air. The functions exercised by such agencies will be considered later in discussing the government regulation of the different kinds of transportation.

There are three general groups of domestic carriers by water, the coastwise and intercoastal carriers, those on the Great Lakes, and those operating upon rivers and canals; all are subject to regulation by the states, as regards their intrastate services, and by the Federal Government as agencies of interstate commerce. However, as will be pointed out later in the chapter dealing with the regulation of transportation by water, neither the states generally nor the National Government authorities have more than partially provided for the regulation of carriers by water (except as regards safety laws and regulations), and the states have been negligent in enforcing such laws as have been enacted. As

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the Coördinator of Transportation states in his report upon the "Regulation of Transportation Agencies,"<sup>1</sup>

A summary of existing state and Federal regulation of the business of water transportation (as contrasted with regulation of safety and allied matters) . . . indicates that a considerable degree of state control is possible under existing laws, but that such powers are generally only slightly used, and that Federal regulation, as found in the Shipping Act of 1916, as amended, and the Intercoastal Shipping Act, 1933, while growing in scope, is still largely ineffective. Particularly lacking are (a) control of the minimum rates which the carriers may charge; (b) control of entrance into and tonnageing of routes; and (c) clear-cut distinctions between the three basic classes of operators [common, contract and private carriers].

In general, the regulation of water transportation and carriers by the states is by the regulatory authorities that have jurisdiction over railroads. The different kinds of authorities established by the states have been described. The scope of regulation varies greatly with different states. Laws concerning safety and other features of navigation have been enacted by all the states except Arizona, Colorado, and New Mexico, which together with several other states have but small need of regulating carriers by water. Thirty-two states—some quite fully, more very partially—regulate the rates and practices of common carriers by water. California, since August 1, 1933, has regulated water carriers "for hire." Only thirteen states concern themselves with "capitalization, mergers, consolidations, and the issuance of securities"; seven states require a water carrier to obtain a certificate of public convenience and necessity; three states require a license; and one state a certificate of inspection and registration. These statements are sufficient to show that many of the states have not considered intrastate water-borne commerce of sufficient importance to require the thoroughgoing regulation of intrastate carriers by water; and the statement made in the report upon the "Regulation of Transportation Agencies" is probably accurate, "That many of the States which have enacted

<sup>1</sup> Senate Document No. 152, 73rd Congress, 2nd Session, p. 8. The report was transmitted to Congress by the Interstate Commerce Commission, March 10, 1934, and on that date the Senate ordered it printed.

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comprehensive regulatory laws are doing little or nothing in the way of enforcement," and "that the States generally do not feel the need of further state regulation of water carriers."

Interstate commerce by water, especially coastwise, intercoastal, and on the Great Lakes, is of large and increasing importance, and the Federal Government has done more than the states have done in regulating carriers by water. However, as will be evident from the discussion in the chapters upon the regulation of transportation by water, the Federal Government has neither fully nor adequately regulated interstate carriers by water, and has not developed a regulatory agency comparable with the Interstate Commerce Commission in authority and efficiency.

The navigation laws concerning aids to navigation and the documenting of vessels, their inspection, and their operation are many and detailed and are administered by several bureaus most of which have been in the Department of Commerce since its establishment in 1913. The most important bureaus connected with the Department of Commerce are the Bureau of Steamboat Inspection and Navigation for measurement and registration of vessels and enforcement of laws relating to seamen, the Steamboat Inspection Service, the Coast and Geodetic Survey, and the Bureau of Lighthouses. In the Treasury Department are the Revenue Cutter Service, and the Coast Guard and Life Saving Service. The Weather Bureau, connected with the Department of Agriculture, and the Hydrographic Office of the Navy Department render valuable aids to navigation, one by forecasting the weather and issuing storm bulletins, the other by providing nautical charts, and by issuing monthly, and (for the North Atlantic) weekly, bulletins covering navigation conditions on the main ocean routes.

In addition to the several bureaus and services connected with different departments of the Government, there are two agencies which have to do with the regulation of the practices, services, and rates of carriers on the ocean, Great Lakes, and other inland waterways, the United States Maritime Commission and the Interstate Commerce Commission. The Shipping Act of 1916 created the United States Shipping Board, which was given

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jurisdiction over ocean lines operating a common carrier service in the interstate and foreign commerce of the United States. Carriers engaged in American commerce were obliged to file their maximum rates and all carriers subject to the Act were required to file their agreements with each other as to rates and services. Such agreements required the approval of the Shipping Board which could, also, upon complaint, decide whether the rates charged by interstate carriers subject to the Act were unreasonable or were unjustly discriminatory. Carriers, American and foreign, engaged in foreign commerce at the ports of the United States were prohibited from granting "deferred rebates" to shippers, from using "fighting ships" to put competitors out of business, from refusing shippers available accommodations, and from unjustly discriminating as between shippers. All carriers subject to the Act were also prohibited from giving one port an undue preference over another port. These and the other regulatory provisions of the Shipping Act of 1916 and the Merchant Marine Acts of 1920, 1928, 1933, and 1936 will be discussed in later chapters.

For several reasons, the United States Shipping Board did not prove to be an effective agency for the regulation of carriers by water. The limited scope of its jurisdiction—which was restricted to common carriers—and of its authority over such carriers as were regulated would have made complete success impossible; but the colossal task, imposed by the World War, a task that came upon the Shipping Board at the very outset of its activities, of commandeering all ships under the American flag, of controlling their use and movements, and of building a vast tonnage of new ships and operating them during the war period and for some years thereafter while the Government-owned vessels were being disposed of, so overwhelmed the Board that little thought could be given to carrying out the regulatory provisions of the Shipping Acts of 1916 and 1920.

In addition to being handicapped by inadequate legislation and by unfortuitous circumstances, the Shipping Board was limited by the fact that the Interstate Commerce Commission had authority over some carriers by water. In the late nineteen-twenties, when the Shipping Board had disposed of or had junked most

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of the merchant ships owned by the Government, and when the operation of Government vessels had been greatly reduced, the Board was concerned with aiding American shipping by carrying out legislation enacted by Congress. Its regulatory powers were limited and its regulating functions were correspondingly restricted.

Presidents Coolidge and Hoover in turn recommended the reorganization and reduction in membership of the Shipping Board, and President Hoover favored the abolition of the Board and the transfer of its general administrative duties to the Department of Commerce and its regulatory powers over the rates and services of carriers by water to the Interstate Commerce Commission. Congress did not take the necessary action, but, on March 3, 1933, Congress authorized the President to reorganize the executive branch of the Government, and on June 10, 1933, President Roosevelt issued an order abolishing the Shipping Board and transferring its duties to the Department of Commerce—the order to be effective 61 days after it was issued.

The Department of Commerce created a Shipping Board Bureau with a board of three members, the chairman of the board being its chief administrative officer. The board reported to and was subordinate to the Secretary of Commerce. This organization of the administration of legislation for the regulation of carriers by water proved to be neither effective nor satisfactory. Fortunately Congress by an act approved June 29, 1936, created the United States Maritime Commission to which was transferred all the powers that had been previously vested in the United States Shipping Board and the Shipping Board Bureau of the Department of Commerce. The activities of the Maritime Commission will be discussed in Chapters XVII and XIX.

The Interstate Commerce Commission has from its establishment in 1887 to date had jurisdiction over, "The transportation of passengers or property . . . partly by railroad and partly by water when both are under a common control, management, or arrangement for a continuous carriage or shipment." If a railroad company owns a steamship line, that line is subject to regulation by the Commission. If a railroad and an independent connecting steamship line establish a through route with through



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rates, the rates are subject to regulation by the Commission; and the Commission can, under the Interstate Commerce Act as amended, establish through routes and rates by rail and water lines, and apportion the joint rates between the connecting carriers. In establishing such through joint rates, the Commission can fix the absolute rate of the rail carriers, but only the maximum rate of the water line. The Commission does not have jurisdiction over the port-to-port services and rates of carriers by water. In the exercise of its authority the Commission has required the railroads to unite with carriers by water in establishing a large number of through or joint routes and rates by rail and river, by rail and lakes, and by rail and coastwise lines. Thus it would require only an extension of its jurisdiction to make the Commission the single agency for the regulation of carriers by water.

### STATE AND FEDERAL AGENCIES FOR THE REGULATION OF HIGHWAY TRANSPORTATION AND CARRIERS

The agency by which a state regulates railroads and public utilities is the one by which highway transportation and carriers are usually regulated. As has been stated, the state commissions have different names in different states; but the three titles, public utility commission, public service commission, and railroad commission, include the agencies of 37 of the states. In five other states the regulatory authority is a corporation commission. Massachusetts has a department of public utilities. In Illinois the authority is a commerce commission, in Kentucky a state tax commission, in Washington a department of public works; in West Virginia the authority is the state road commission. Delaware has no commission. The authorities here referred to are those that grant highway carriers certificates or permits to operate and that regulate services and rates, where such regulation is exercised. For the construction and maintenance of state highways, the states usually have a highway department headed by a commissioner or secretary or an otherwise appropriately designated official.

The Federal Government has, in the Department of Agricul-

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ture, the Bureau of Public Roads, which is the agency through which the United States has aided the states in highway construction since the enactment of the first Federal-aid Road Act by Congress in 1916. This act and the subsequent amendatory acts specify for what classes of roads the states may be given aid from Federal appropriations, the amount of aid per mile, and the conditions under which allotments to the states shall be made. The provisions of the Federal statutes and the authority given to the Secretary of Agriculture, and thus to the Bureau of Public Roads, have enabled the bureau to determine what state roads shall be aided and the kind of roads that shall be constructed. In consequence, the bureau has brought about the development and linking up of state roads into a country-wide system of highways constructed and maintained in accordance with standards prescribed by the Federal Government. Details as to the large amount of Federal aid to highway construction will be set forth in Chapter XX. The use of public relief funds for road building has greatly increased such expenditures since 1933.

The Federal Government has supplemented its program of aid to highway construction and development by providing for the comprehensive regulation of interstate carriers using the highways. The Motor Carrier Act approved August 9, 1935, has vested such regulation in the Interstate Commerce Commission, which will have the administrative coöperation of the state commissions and of regional boards composed of representatives of the state commissions, which boards may exercise, under the Interstate Commerce Commission, jurisdiction over the granting of certificates and permits to motor carriers, over complaints of shippers or carriers, and over the administrative enforcement of the congressional statutes and of the rules and regulations prescribed by the Interstate Commerce Commission. Decisions and orders of a regional board are subject to review by the Commission either upon its own initiative or upon appeal by an interested complainant. The urgent need for this Federal regulation of highway transportation and carriers, the kind and scope of regulation that has been provided, and the administrative ma-

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chinery by which the regulation is being exercised will be discussed in the chapters comprising Part V of this volume.

### STATE AND FEDERAL AGENCIES FOR THE REGULATION OF AIR TRANSPORTATION AND CARRIERS

The development of aviation and air transportation has caused the majority of the states to provide agencies for administering the safety laws that have been passed and for enforcing such regulatory statutes as have been enacted. Most of the 31 states that have adopted statutes concerning the registration, licensing, and operation of aircraft have vested the administration of the laws in a special aviation or aëronautics tribunal, but some of the states have given jurisdiction over air transportation and carriers to such existing agencies as "the superintendent of motor vehicles (California), the department of public works (Idaho), the secretary of state (Maine), the registrar of motor vehicles (Massachusetts), the public service commission (New Hampshire), and the state highway commission (Oklahoma)."<sup>2</sup> In only 11 states and the District of Columbia are those who transport persons or property by aircraft for hire classed as common carriers and regulated as such by the state commission or authority that has jurisdiction over common carriers. The degree and scope of regulation varies with the states, and the several state agencies, with few exceptions, that have jurisdiction over air carriers confine themselves mainly to the administration of safety laws. State regulation seldom goes beyond requiring intra-state air carriers to obtain a certificate of public convenience and necessity and to make prescribed reports. There is no manifest necessity for the state regulation of the rates of air carriers.

The twofold reason for the slight regulation of air carriers by the several state agencies is that air transportation is in the early stages of its development and is mainly and increasingly interstate in character. If and when the rates and services of air carriers are regulated, the task will necessarily be performed mainly

<sup>2</sup> Regulation of Transportation Agencies, Senate Document No. 152, 73rd Congress, 2nd Session, p. 258.

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by the Federal Government; even in legislation and administrative action concerning safety, the Federal Government must take the lead and set standards; the states can do little more than supplement what the United States does.

The agencies for the regulation of air transportation were created by the Air Commerce Act of 1926. The principal agency is the Department of Commerce, provision having been made by the law for the appointment of an Assistant Secretary of Commerce. A Bureau of Aeronautics (now the Bureau of Air Commerce) was organized to perform the many duties connected with examining, rating, and registering of all aircraft that may be operated interstate, of examining, rating, and licensing airmen, and of establishing air-traffic rules. Several other departments of the Government also have duties and authority under the Air Commerce Act. As stated by Professor Charles C. Rohlfling:

The President of the United States is authorized in section 4 to make necessary airspace reservations. To the Secretary of the Treasury is delegated the duty of providing regulatory rules for the entry and clearance and customs regulation for aircraft engaged in foreign commerce (section 7-8). The Secretary of Labor is empowered to deal with all immigration problems relative to aircraft (section 7-d). Meteorological information is to be supplied by the Secretary of Agriculture (section 2-b). The Secretary of War is permitted to designate military airways (section 6-f). Finally the Bureau of Standards is directed to do such research and development work as tends to create improved air navigation facilities (section 2-d).<sup>3</sup>

The power given the postmaster-general under the Air Mail Acts of 1925, as amended in 1926 and, especially, in 1928, to make contracts for the carriage of air mail, enabled him to exercise large authority over air carriers and to further the growth of their services. The large expenditures resulting from the air-mail contracts, the union of the major contracting companies into a small number of combinations, and his objection to the manner in which some of the contracts were let and were extended in scope so as greatly to enlarge the Government's obligations caused the postmaster-general to annul the contracts early in 1934. This was followed by the enactment of Congress of the Air

<sup>3</sup> *National Regulation of Aeronautics* (1931), p. 35.

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Mail Act, approved by the President June 12, 1934 (somewhat amended in 1935), which authorized the postmaster-general to enter into temporary contracts, for periods not exceeding nine months, for the carriage of the air mails. The law provided that the rates paid for the carriage of the mails should not exceed the maxima named in the law, and also provided that the Interstate Commerce Commission should, after investigation, fix the rates to be paid for the carriage of air mails over each of the routes selected by the postmaster-general as desirable. The rates fixed by the Commission must be within the general maxima named in the statute. To perform its duties the Commission has established an Air Mail Bureau. Thus another Government agency concerned with air transportation has been created.

With the exception of the control over air-mail carriers exercised by the Post Office Department and the fixing, by the Interstate Commerce Commission, of the rates for the carriage of air mail, the Federal Government's relation to air transportation is mainly the promotion of safety and the granting of aid to those engaged in the service. By surveying, mapping, and lighting the main airways, by providing landing fields, by coöperating with the local authorities in providing airports, and by giving numerous air carriers liberal payment for transporting the mails, the Federal Government is assisting such carriers in developing their facilities and services for the transportation of passengers and high-grade express matter. As yet it has not been thought necessary to provide for the regulation of the finances, services, and rates of carriers engaged in the air transportation of passengers and commodities.

### GENERAL CONCLUSIONS

The foregoing description of the main agencies by which the states and the Federal Government regulate transportation by rail, road, water, and air and the brief statement of the major functions exercised by those agencies indicate the existence and activity of a large number of agencies that are for the most part dissociated from each other. The causes that account for the past development of the machinery for the administrative regulation of the several kinds of transportation and carriers are manifest.

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Have we not, however, reached the point where, with the information gained from the experience we have had, we can successfully take up the task of coördinating and in large measure unifying the Federal agencies by which transportation and carriers are regulated? Fortunately, under the able leadership of the former Coördinator of Transportation, an earnest effort is being made to accomplish this task. If Congress so legislates as to apply like principles of regulation to all four classes of carriers, and provides for the coördination, under one unifying authority, of all the agencies for the regulation of carriers engaged in interstate commerce, the ideal of administrative regulation of transportation stated in the opening paragraphs of this chapter will have been realized.

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PART III

GOVERNMENT REGULATION OF  
RAILROADS IN THE UNITED  
STATES: MAJOR PROBLEMS  
AND POLICIES





## CHAPTER IX

### GOVERNMENT REGULATION OF RAILROAD FINANCIERING: NEW CONSTRUCTION, SECURITY ISSUES, AND RAILROAD HOLDING COMPANIES

THE subject of the government regulation of transportation is of large scope and comprises many important topics. For more than 60 years the several states, and for over 50 years the United States, have been enacting laws which, with numerous eliminations, amendments, and additions, have resulted in the present legislative policy. There is much diversity in the regulatory legislation of the different states; and, as the preceding chapters of this book sufficiently indicate, the Federal Government has a complicated, uncoördinated, and as yet incomplete system or plan of transportation regulation. Indeed, both in the states and in the Federal Government, the regulation of carriers, especially the water and air carriers, is still in the making and is certain to be the subject of public thought and legislative action for some time to come. In general, the task to be accomplished is the efficient and constructive regulation of each of the several classes of carriers, those by waterways and air as well as those by rail and road. This requires an understanding of the problems to be solved and the adoption of the legislative and administrative policies that will best solve the problems. An explanatory analysis of the present problems of government regulation of transportation, a discussion of the policies of regulation that are now being carried out, and the presentation of suggestions that have been made by those who are best informed as to changes and additions in policy that are needed to make regulation more adequate, more effective, and more helpful to the carriers and the public they serve, should be of some assistance. Hence the consideration here being given to the major problems and policies of government regulation of transportation.

The railroads are more fully regulated, both by the states and

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by the Federal Government, than are other classes of carriers. From the experience gained in regulating the railroads, it should be, and will be, easier to determine what principles should control and what policies should be followed in regulating other agencies of transportation. There are other reasons, also, why in the following discussion more space should be given to the problems and policies of railroad regulation than is devoted to the consideration of other kinds of transportation and carriers. The railroads are, and long will be, the chief carriers of freight. They are vitally essential to successful agriculture, industry, and commerce, and, as railroad transportation is mainly interstate, its regulation by the Federal Government both narrows the scope of railroad regulation by the states and in large measure fixes the standards and policies of their regulation.

The discussion of the major problems and policies in Part III of this volume will be concerned with those connected with the Federal regulation of railroads, with such references to regulation by the states as may be pertinent. It will not be necessary, and would be impracticable, to consider all the many provisions of the comprehensive Interstate Commerce Act as amended. Only the main provisions of the detailed statute will need to be referred to. Furthermore, the problems discussed will necessarily be limited to those that are in fact of major importance, but which require for their proper treatment the adoption and application of the main policies of government regulation not only of railroads but of other agencies of transportation.

The accomplishment of this somewhat ambitious purpose can, it is hoped, be achieved by discussing in successive chapters the problems involved and the government policies followed in: (1) the approval of new railroad construction, abandonment of lines, and the regulation of railway financiering; (2) the regulation of services performed by the railroads; (3) the regulation of the working conditions and the wages of railway labor and the adjustment of disputes connected therewith; (4) the fixing, adjustment, and stabilization of railroad rates and fares; and (5) the control and development of railroad consolidations and of the coördination of the railroads and other agencies of transportation.

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The limitation of the discussion to these topics leaves out of consideration such interesting subjects as the government control of railroad accounting, and financial and statistical reports. These and many other phases of government regulation of the railroads have been so effectively and adequately dealt with that they do not now present problems requiring special consideration in this discussion. When the regulation of carriers by water, road, and air is discussed, reference may be made to the policy followed by the Government in dealing with phases of railroad regulation not considered in this and the following chapters dealing with the major problems of government regulation of railroads.

### GOVERNMENT APPROVAL OF NEW CONSTRUCTION

Government regulation of railroads now begins with a decision by the Interstate Commerce Commission as to what new or additional lines may be constructed and how such new construction, if approved by the Commission, shall be financed. By requiring railroad companies to obtain approval of proposed construction and to secure permission to abandon lines in operation, the Federal Government exercises control over the future development of, and changes in, the railway net of the country. This authority was given the Interstate Commerce Commission by the Transportation Act of 1920 and is set forth in paragraphs (18), (19), and (20) of Section One of the Interstate Commerce Act as amended.<sup>1</sup> It was the same act of 1920 that required railroad

<sup>1</sup> Section One, paragraph (18), of the Interstate Commerce Act provides that: "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." Paragraph (19) concerns procedure, while paragraph (20) provides that: "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for

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companies to obtain the Commission's approval of the issue of securities. This provision of the Act of 1920 is contained in Section 20a of the Interstate Commerce Act as amended.

The authority to require carriers proposing to construct new railroads or extensions to existing lines to obtain a certificate of public convenience and necessity was given the Commission by the Act of 1920 as a protection both to the carriers and the public. Before the power was given the Commission to decide whether a new line or an extension should be built, and, if constructed, to approve of its location, a railroad that might be serving the public adequately and that might be prosperous could be injured and made unprofitable by a competitive line, not built because of public need, but as a speculative enterprise whose promoters might hope either to obtain for the new line such share of the older line's traffic, or of the increased traffic of the future, as to make the new road an operating success or to compel the company owning the older line to buy the competing line at a profit to its promoters. A conspicuous illustration of unjustifiable railroad construction in the earlier days of railroad development was the building of the West Shore, that was built by interests knowing that the New York Central would feel obliged to buy the parallel line constructed by its piratical competitors. Had those who built the West Shore been obliged to obtain from public authority a certificate of public convenience and necessity, the railroad would not have been constructed, at least not at the time it was built.

A notable instance of the wisdom of requiring commission approval of the construction of a railroad was afforded by the action of the Commission in denying a certificate of public convenience and necessity to those who had organized the New York, Pittsburgh and Chicago Railroad Company with the intention of constructing a new low-grade line across the State of Pennsylvania at a cost estimated in 1925 at 205 million dollars, but later reduced to about 178 million dollars. While this line would have shortened the distance by rail from the Delaware

the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

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River to Pittsburgh by 74 miles and would have crossed the Allegheny Mountains at a much lower elevation than do the existing trunk lines, there was no traffic need for an additional trunk line; and it did not appear to the Commission that there would be an adequate return on the invested capital. In view of the business conditions that developed after the application was made for a certificate authorizing the proposed construction, it is certain that the traffic and earnings of the road would not have made the road profitable.

This application was before the Commission for an exceptionally long time. The first hearings were before an examiner who in October, 1925, submitted his report to the Commission recommending that a certificate be denied; the principal grounds upon which the recommendation was based were that estimates of operating economies were defective and that there had not been an adequate survey made to determine the possible traffic. The Commission had a second hearing in December, 1929, but did not announce its final decision until October 11, 1932. The reason for this delay was the general decline in business and in railroad traffic which indicated "the impropriety of the construction of any additional railroad mileage in the east in the near future." The Commission recognized "the obvious superiority of the line proposed and its possible value as an addition to the national transportation system, providing that increases in traffic might be found to justify the proposed construction without corresponding injury to existing routes," but was obliged to decide "that neither present nor future public convenience and necessity has been shown, or can now be shown, to require construction of the proposed line."<sup>2</sup>

In the case just referred to the Commission refused to permit the construction of a railroad that was not needed and that would have injured existing systems by its competition for their traffic. In another notable case, however, the Commission, at about the same time, authorized the construction of a railroad to increase competition. The construction authorized was that of a road 204 miles long across northeastern California from Klamath Falls, Oregon, reached from the East and North by

<sup>2</sup> Interstate Commerce Commission, Finance Reports, Vol. 187, pp. 598-602.

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the Great Northern Railway, to Keddie, California, a point on the Western Pacific Railroad. This connection, built partly by the Great Northern and partly by the Western Pacific, enabled the Great Northern via the Western Pacific to reach San Francisco Bay and the other centers of California traffic, while the Western Pacific, via the Great Northern, could participate under favorable conditions in the traffic moving westbound and eastbound between the mountain states of Utah and Colorado and the Pacific northwest. Prior to the construction of this connecting railroad, the Southern Pacific Company had the only railroads connecting California with Oregon and with the railroads north from Portland. Moreover, the Southern Pacific and its connections at Salt Lake City had a distinct advantage over the more northerly transcontinental lines in handling the traffic between California and Montana, the Dakotas, and Minnesota, through which the northern lines passed to Oregon and Washington. Via the Klamath Falls-Keddie connection with the Western Pacific, the Great Northern now connects its territory with California by a line that is competitive with, and more direct than, the Southern Pacific and its connections. Naturally the Southern Pacific vigorously opposed the granting by the Commission of a certificate of public convenience and necessity permitting the Klamath Falls-Keddie connection to be built; but the certificate was granted, because the Commission was convinced that the new road would not only provide needed transportation for the section through which it passed, but would also be of wide public benefit by providing intersystem railroad competition for much traffic moving to and from Utah, California, the Pacific Northwest and Montana, the Dakotas and Minnesota.

These references, first, to the West Shore, constructed when any company could undertake the construction of a railroad without interference by Federal authority, second, to the proposed additional eastern trunk line across Pennsylvania which the Commission did not allow its proponents to build because an additional line was not needed and would, by diverting traffic from the existing trunk lines, weaken them and thus lessen their ability to serve the shippers and industries dependent upon them, and, third, to the Commission's approval of the construc-

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tion of the line connecting the Great Northern and Western Pacific lines because the connecting road would give large sections in the western and northwestern states the benefits that may be derived from properly regulated intersystem railroad competition, are sufficient to indicate the problems solved and the principles followed by the Commission in the exercise of its authority to grant or refuse certificates of public convenience and necessity to applicants proposing to construct additional railroads.

Most applications for certificates of public convenience and necessity are for permission to construct short lines and extensions; and, under business conditions that followed 1929, very little railroad construction was possible or was needed. The annual reports of the Interstate Commerce Commission state, year by year, the number of applications filed and the number of certificates issued. During the year ending October 31, 1936, there were six certificates issued authorizing the construction of 107 miles of railroad. From the effective date of the Act of 1920 up to the end of October, 1936, the Commission had approved of the construction of 9,956 miles of new railroad of which, however, only 6,809 miles had been built. It will be of interest to compare these figures with the number of miles of road abandoned, figures for which will shortly be presented.

### GOVERNMENT APPROVAL OF ABANDONMENT OF RAILROAD LINES

The obvious purpose of providing by statute that "no carrier by railroad . . . shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment" is to protect the public against being deprived of the transportation services upon which they are dependent. The provision of the statute just quoted is based upon the sound principle that, when a company constructs a railroad, or a branch line thereof, and communities are built up and industries developed along the railroad, the company has an obligation to serve the communities and industries dependent upon the railroad unless and until it has been shown that the com-

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pany operating the road is no longer able to continue service or it has been shown that adequate means of transportation other than the railroad in question have been or can be provided. It often happens that the railroad sought to be abandoned, because its operation has become unprofitable, is a branch line or a relatively small part of a large system, and that the company operating the system can, without being unjustly burdened, be required to operate the small part of the system that it may wish to abandon. In a number of instances, however, industrial changes and the development of non-railroad transportation agencies have made impossible the continued operation of railroads that are relatively long and that were formerly operated with success.

Two instances may be cited of railroads of considerable length whose abandonment has been authorized by the Commission.<sup>3</sup> The Chicago and Eastern Illinois was permitted by the Commission in 1922 to abandon the Chicago and Indiana Coal Railway Division, 162 miles in length. This division was constructed to bring to market bituminous block coal which at the beginning of the road's operation made up 70 per cent of the coal traffic originated on its line. In time the block-coal mines were practically exhausted and the road could not obtain enough other traffic and revenues to maintain its line in fit condition for operation. As the road was a division of a railroad system not financially prosperous, continued operation was impracticable and its abandonment was authorized. The abandonment of a still longer line of road was authorized when, in 1923, the Commission permitted the Chicago, Peoria and St. Louis Railroad to cease operations. This road, which ran from Pekin to Grafton, Illinois, a distance of 234 miles, was built to serve an agricultural and mineral section but, as it was built in a region served by other and stronger railroads, and, as in 1922 a concrete highway nearly parallel to its line was completed, the accumulating operating deficits made the proper maintenance of the road and its continued operation impracticable, and its abandonment was permitted.

<sup>3</sup> Consult *Regulation of Railroad Finance* by Frederick, Hypps, and Herring, pp. 47-48. The references to the reports of the Interstate Commerce Commission are Abandonment of Line by C. & E. I. R.R., 71 I.C.C. 609, and Abandonment of Chicago, Peoria, and St. Louis R.R., 76 I.C.C. 801.



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That there was need of safeguarding the public against the abandonment of essential railroads, especially during the depression years following 1929, is clearly indicated by the Commission's figures as to the mileage sought to be abandoned and by the data as to the number and mileage of abandonments authorized. Since the Act of 1920 became effective, the Commission, up to October 31, 1936, has received 1,267 applications for abandonments comprising nearly 22,434 miles of railroad, and the 1,070 certificates issued covered nearly 16,594 miles of road. During the six years following 1930, the Commission issued 878 certificates allowing 9,950 miles of railroad to be abandoned. As the Commission states in its 1934 annual report (p. 21), "The reason generally advanced to warrant abandonment . . . was insufficient traffic, resulting from various causes, including failure of expected traffic to develop, exhaustion of sources of traffic in the case of forests and mines, and losses of traffic to competing lines of railway or other transportation agencies." Without doubt the financial difficulties of the railroads caused by the long and severe business depression that began with 1930, and the contemporaneous rapid increase in the traffic handled by unregulated motor carriers struggling to maintain themselves by reckless competition with each other and with the railroads, would have resulted in the abandonment of a much larger mileage of railroads if the carriers could have withdrawn their services from unprofitable lines without securing from the Commission a certificate of public convenience and necessity. Even with public control over abandonment, the number of miles abandoned since 1920 has been nearly double the number of miles added by new construction, thus causing a shrinkage of about 10,000 miles in the country's railroad system. Presumably one may be justified in thinking that the decrease now taking place is temporary and that the future development of business and the growth of population will be accompanied by an increase in railroad mileage, as well as in the mileage of highways and waterways, although it is quite certain that the future expansion of the railroad system of the country as a whole will be much slower than the past growth has been.

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## GOVERNMENT REGULATION OF RAILROAD SECURITIES

Railroads are financed by the issue and sale of bonds and stocks. By the Transportation Act of 1920, railroad companies can issue and sell bonds or stocks, either to secure funds for new construction or for refunding existing obligations or for a reorganization of their financial structure, only after obtaining the permission of the Interstate Commerce Commission and its approval of the kind and amount of the securities to be issued and of the price at which they are to be offered for sale. The government regulation of railway financiering is intended to be as definite and complete as its regulation of the construction and abandonment of railroads and of the rates and services of railway carriers.<sup>4</sup>

<sup>4</sup> Those provisions of the Act of February 28, 1920 that provide for the government regulation of the issue of railroad securities are contained in Section 20a, paragraphs (1) to (11) inclusive, of the Interstate Commerce Act as amended. Paragraph (2) provides that: "It shall be unlawful for any [railroad] carrier to issue any share of capital stock or any bond or evidence of interest in or indebtedness of the carrier . . . or to assume any obligation or liability as a lessor, lessee, guarantor, endorser, surety, or otherwise, in respect of the securities of any person natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for that purpose."

Paragraph (3) provides that the Commission may grant or deny an application in whole or in part or "may grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate." Paragraph (8) stipulates that nothing in the Act "shall be construed to imply any guaranty or obligation as to such securities on the part of the United States." Paragraph (10) enables the Commission to require the carriers to make periodic reports of "the disposition of the securities and the application of the proceeds thereof."

The provisions of the Act do not apply to the issue of notes "maturing not more than two years after the date thereof and aggregating (together with all other outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding." This provision is in paragraph (9).

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The need for, and importance of, the government regulation of the financial policy and practices of the companies that provide the country with railroad facilities and services are manifest. The railroad companies receive their charters from the states, and, before the Federal Government began to regulate railroad financiering, about half of the states had adopted laws providing, in different measure, for the government supervision or control of the issue of railroad securities. This task is one, however, that could be performed by the states only if all the states acted and adopted uniform laws that were given like interpretation and administration, a condition not possible of attainment. The Interstate Commerce Commission, as early as 1907, recommended Federal regulation of the issue of railroad securities; President Taft favored it as a part of the bill that became the Mann-Elkins Act of 1910, but the Act provided only for a commission to investigate the subject and make a report. The Federal Securities Commission, appointed by President Taft, did not report in favor of government regulation of security issues, but recommended that railroad companies be required to give the Government full information concerning their issue of securities. It was thought by the Securities Commission that full publicity of railroad financiering would afford adequate protection to the public and to investors. Congress did not adopt the Commission's recommendation, and little would have been accomplished if Congress had so acted. To require corporations to tell what they have done after they have acted is not supervision of their actions, much less is it regulation.

The financial wrong-doings in connection with the New Haven, the Père Marquette, the Alton, and other roads, and the inability of the states to prevent what was done had made clear the necessity for Federal action; and when the Transportation Act of 1920 was passed there was general agreement that the Interstate Commerce Commission should be vested with the broad power of regulating railroad financial affairs that is provided by the Act. This power was given the Commission for a threefold purpose, to protect the general public by preventing unwarranted additions to railway capitalization, to protect the investors in railroad stocks and bonds against unjust financial practices, and

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to protect the railroads against paying more than they should for the capital needed to meet their requirements. The provisions of Section 20a of the Interstate Commerce Act have proved to be sound in principle and they have been wisely and efficiently administered.

There are numerous purposes for which railroad securities are issued: to secure funds for new construction, to refund maturing obligations, to return funds to the carrier's treasury for investment in road or equipment made from income, and to obtain the working capital or the funds for operating expenses required for the maintenance of the carrier's services during a period of temporary reduction in revenues or a period of exceptional expansion of service. A carrier may also desire to issue bonds that may be used for one or more of several financial purposes, such as security for notes that a carrier may issue for a period of two years or less under the provisions of paragraph (9) of Section 20a, for security for loans made by the United States, to obtain funds to meet sinking-fund requirements, to exchange for bonds of subsidiary companies, to carry out a plan of financial readjustment, to meet current indebtedness, or to have bonds in the treasury that the carrier may issue from time to time in accordance with the Commission's orders. The securities that a railroad company may need to issue to purchase the property or securities of another railroad company in bringing about a consolidation that has been permitted by the Commission must be approved by the Commission. Likewise, under the Emergency Transportation Act of 1933, a non-railroad company may acquire control, by stock ownership, of one or more railroad companies only with the consent of the Commission, and when such consent is given, the issue of securities by the holding company is subject to the regulation by the Commission that is prescribed by Section 20a of the Interstate Commerce Act.

The Commission's task in administering Section 20a is to determine the general requirements to be met by railroad companies in issuing securities, and to regulate the action taken in the case of each particular issue. The authority and the duty of the Commission are to regulate the practice of the carriers, while not depriving them of the opportunity to exercise their judg-

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ment as to financial management. It is not easy to draw a distinct line between regulation and management, and the Commission is to be commended for the care it has taken to keep within the jurisdiction given it by the statute.

The first question to be considered by the Commission, in acting upon an application of a carrier for approval of a proposed security issue, is whether the purpose for which the securities are desired is one that will be of benefit to the public served, and is one that can be carried out without injury to investors and to other carriers. If the purpose is approved, the Commission will then consider whether the securities which the carrier proposes to issue are of the proper amount and kind and are to be sold at such price and in such manner as the Commission can approve. If the Commission were to decide these questions in the case of all applications by applying inflexible rules, it could not avoid taking from the railroad companies the management of their finances, but by considering each application with reference to the particular facts and circumstances involved, by conference with officials of the applicant company, and by holding a hearing when one is requested by parties that will be affected by its decision, the Commission is able to play an advisory and helpful, as well as a mandatory, rôle and thus to regulate rather than to manage the financial affairs of the railroads.

When the Commission began the regulation of security issues under the Act of 1920, it not unnaturally gave special consideration to such objections as were raised by those who might be opposed to the carrier's proposed use of the funds sought or to the carrier's proposal as to the securities to be issued. If no objections were raised, or if the objections did not seem convincing, the Commission gave its approval without requiring the applicant to prove the public necessity of the proposed expenditure or to show that the particular kind or kinds of securities were the ones that should be issued. This policy of the Commission was soon changed by requiring the carrier to give affirmative proof of the public necessity for the proposed expenditure; and a third step was taken in the development of its administrative policy when the Commission began to give additional and special attention not only to the amount, but also to the kinds, of securities

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to be issued, whether all bonds, or part in bonds and part in stocks, and also to the minimum price at which bonds should be offered for sale. It is customary for the carrier to reach a preliminary agreement with a favored banking house for the purchase, at a stipulated price, of the securities if and when their issue is approved. The Commission is informed as to the arrangement and price, and if they are satisfactory to the Commission its approval will be given, otherwise the carrier will carry on further negotiations with bankers to obtain, if possible, terms that will satisfy the Commission. Latterly the Commission has been watchful as to the rate of compensation paid by carriers to banking houses for the distribution and sale of securities; and, in the case of equipment trust certificates, the Commission has been disposed to require the carrier to solicit bids of several possible purchasers.

The administration of the provisions of the Interstate Commerce Act concerning the issue to carriers by rail of certificates of public convenience and necessity, and the regulation of the issuance of securities, and the assumption of financial responsibilities by railroad companies, are vested by the Commission in its Bureau of Finance which is subject to the supervisory control of a division of the Commission. The administrative policy, as developed by its experience in the regulation of the issue of securities and of the financial obligations of railroad carriers, was fully embodied by the Commission in its order of February 19, 1927, which sets forth specifically and in detail the requirements that must be met, and the information that must be supplied, by carriers seeking approval of proposed security issues. The policy followed by the Commission through its Bureau of Finance in enforcing Section 20a may be indicated by referring briefly to the Commission's application of the law to some of the major problems of railroad financing.

The statute stipulates that the Commission shall approve of a security issue or financial assumption by a carrier only if the carrier's action is "compatible with the public interest." The statute does not, and could not, define closely and with finality what action by the Commission is made necessary by this requirement, but the statute indicates in general what is meant by

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compatibility with the public interest by stating that the Commission shall issue an order of approval only if the proposed security issue or financial assumption "is for some lawful object . . . which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service." The Commission has held that property to be acquired by the issue of securities shall be property held for or used in the service of transportation; and, in general, the Commission has ruled that property acquired by a carrier through an addition to its outstanding securities shall have prospective earnings somewhat in excess of operating expenses and fixed charges; but in some instances the Commission has approved expenditures for property that did not have the prospect of being profitable *per se*, but which gave promise of being helpful to the carrier's system and services as a whole, and thus beneficial to the public.

Unless the new securities issued by a carrier are for the reduction or cancellation of capital obligations of an equal amount, there will be an increase in the carrier's capitalization, and the Commission, in passing upon applications, must decide whether the carrier should be permitted to add to capitalization for the purposes set forth in the application. Such a decision necessarily involves the consideration of several factors, such as the necessity for the proposed issue, the carrier's present capitalization and assets, the purpose of the issue and the use to be made of the funds obtained, whether the carrier proposes to issue a stock dividend or to add to the cash balance in the treasury. In general the Commission must decide what are the proper bases of capitalization, or what may rightly be regarded as capitalizable assets.

In connection with applications for approval of the issue of securities to effect the reorganization of a railroad company's financial structure, the Commission has large responsibilities and the opportunity to render a valuable service to the railroad companies, their investors, and the public served. Prior to the enactment of the Bankruptcy Act approved March 3, 1933, insolvent roads were necessarily reorganized in the interest of the creditors

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by the process of a receivership, which was not only expensive, but which frequently resulted in the perpetuation of an unsound financial structure. By Section 77 of the Act of March 3, 1933, as amended by acts approved August 27, 1935, and June 26, 1936, the Commission shares with the courts the task of reorganizing insolvent carriers. Such carriers are placed by the court in charge of trustees selected by the court and ratified by the Commission. The plan of reorganization that, after a public hearing, is approved by the Commission is submitted to the court and then by the court to the stockholders and creditors; and, when the requirements of the statute have been met, "the Commission, may, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or consolidation or merger of properties, to the extent contemplated by the plan consistent with the purposes of the Interstate Commerce Act as amended." The provisions of Section 77 of the Bankruptcy Act of 1933, upon recommendation of the Commission, were so changed by the Act approved August 27, 1935, as to make them more effective<sup>5</sup> and more helpful to insolvent railroads and their creditors and stockholders.

In acting upon the merits of applications for permission to issue railroad securities the Commission cannot avoid considering the type or kinds of securities the applicant proposes to issue, the price at which the securities are to be offered for sale, and the method or arrangement by which the securities are to be sold. If the Commission did not consider these questions, it could not be as helpful to carriers as it should be, it could not adequately protect investors and the public against improper financial practices, nor could it hope by regulation to aid in developing a sound general policy to be carried out in railroad financing; but, while it is necessary for the Commission to consider the kind of, and the selling price of, the securities approved and the arrangement that the carrier may wish to make for their sale, it is also equally important that the Commission should not take from railroad directors and officers the primary responsibility and duty of determining and administering the financial

<sup>5</sup> See Annual Report of the Interstate Commerce Commission for 1935, pp. 20-22, for a summary of the provisions of the Amendatory Act of 1935.



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policy of their companies. The task of the Commission is to co-operate with the financial officials of the carriers, to veto what should not be done and to give approval to actions that are in harmony with sound public policy. The Commission's outlook is broader than the corporation's viewpoint is apt to be. The aim of regulation is to protect the public interest without preventing the play of private initiative and enterprise in the drama of railroad financiering.

The Bureau of Finance, under the Commission's guidance, has succeeded in keeping regulation within desirable limits. A carrier wishing to issue securities will ordinarily confer with the banking house that acts as its counsel in regard to finances, and they will come to a tentative agreement as to the price that the banking house, or a syndicate that it may form, will pay for the securities and the price at which they shall be offered to the public. Then the railroad officials have an informal conference with the Commission's Bureau of Finance which may find the general plan satisfactory, or may require modifications in the plan. If the modifications required are acceptable to the railroad and if the banking house accepts the changes in the tentative agreement that must be made to meet the requirements of the Bureau of Finance, the railroad company will file its application giving the detailed information called for by the Commission's regulations. The Commission sends to the public service commission and the governor of each interested state a copy of the application, thus enabling them to object, if they so desire. The Commission makes such investigation as it deems necessary and acts on the application as promptly as possible. Usually only about 30 days intervene between the filing of the application and action by the Commission. Often less time is required for action.

A temporary but effective power to regulate one phase of railroad finances was given the Commission by the statute requiring its approval of loans made to railroads by the Reconstruction Finance Corporation created by the Act of January 22, 1932. From February, 1932, until October 31, 1936, applications for loans from funds of the Reconstruction Finance Corporation were made by or for 164 carriers, and loans to 71 of the applicants were approved by the Commission. The total amount of

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the loans disbursed by the Reconstruction Finance Corporation to December 18, 1936, was \$516,206,239 of which \$171,048,791 had been repaid by the borrowers, leaving \$345,157,448 as their outstanding obligations to the Reconstruction Finance Corporation. The National Industrial Recovery Act of 1933 authorized the Public Works Administration to make loans to railroads for equipment and maintenance work, and somewhat more than 200 million dollars was advanced on short-term loans. The status, as of December 31, 1936, of the loans made to the railroads by the Reconstruction Finance Corporation and the Public Works Administration, of the repayments made by the railroads, and of the sale by the Government of the securities received from the aided railroads is shown by the following table:

### GOVERNMENT RAILWAY FINANCING: STATUS DECEMBER 31, 1936 \*

Total loans (R.F.C. and P.W.A.) . . . . .	\$717,951,000
Repaid by railways . . . . .	209,259,000
Balance, December 31 . . . . .	<u>\$508,692,000</u>
Of which there had been sold to the public, at a net profit of \$4,247,000 . . . . .	105,613,000
Still held by Government . . . . .	<u>\$403,079,000</u>

\* From "A Review of Railway Operations in 1936," p. 12, by the Bureau of Railway Economics, Association of American Railroads.

From the table it will be seen that, of the total government advances to the railroads, \$209,259,000 had been repaid, and it is a significant fact that more than half of the repayments during the four years 1932 to 1936 were made during 1936. It will also be noted that, of the securities taken by the Government for the loans made, there had been sold, to the public, securities amounting to \$105,613,000, and at a profit to the Government of \$4,247,000.

The Reconstruction Finance Corporation Act which would have terminated January 31, 1935, was extended, by an act approved on that date, for two years with several amendments that gave the corporation ample latitude in making or renewing loans to railroads and in purchasing their obligations; and the Act as amended provided that, "The corporation may require as a condition of making any such loan or renewal or extension for a period longer than five years, or purchasing any such obligation

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maturing later than five years from the date of purchase by the corporation that such arrangements be made for the reduction or amortization of the indebtedness of the railroad, either in whole or in part, as may be approved by the corporation after a prior approval of the Interstate Commerce Commission." A maximum limit of 350 million dollars was put upon further loans and purchases by the Government in addition to advances previously made. In 1937 the Act was again extended for two years. The provision of the statute, as amended in 1935, concerning the amortization of future loans to railroads, was in line with the policy advocated by the Interstate Commerce Commission in its report for 1933, where it declares in favor of "the provision of sinking funds to be set up by railway companies out of net income for the purpose of retiring a part of their funded debt before maturity." The Commission further stated that, "If such funds are not voluntarily established by the railway companies, their establishment may be required as a condition to our authorization of further bond issues under the provisions of Section 20a of the Interstate Commerce Act." The inauguration of this desirable policy may well start with the return of such business prosperity as will make it possible for the railroads to build up sinking funds out of their net earnings.

The knowledge of the Commission regarding the condition and needs of the carriers, and its experience in regulating security issues, has enabled it to be of great assistance to the Government in avoiding mistakes in granting temporary aid to the carriers, to enable them to meet their financial difficulties, and to assist them in giving work to many men who would otherwise have been unemployed.

### FEDERAL REGULATION OF RAILROAD CONSOLIDATIONS BY NON-RAILROAD HOLDING COMPANIES

The authority of the Commission over the issue of railroad securities is especially important in its exercise of jurisdiction over railroad consolidations. By the Transportation Act of 1920, the Commission had control over the issue of securities in connection with the consolidation, with the Commission's approval,

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of two or more railroads (one railroad company acquiring control over the others) and in connection with the merger of two or more railroads under the ownership of a newly organized railroad company; but the Commission did not have jurisdiction over the securities issued by a non-railroad company to acquire financial control of railroad companies. Such jurisdiction was given the Commission by the Emergency Transportation Act of 1933, which provides that, with the Commission's approval, "a corporation which is not a carrier" may "acquire control of two or more carriers through ownership of their stock," but such non-carrier corporation thereby becomes subject to Section 20 of the Interstate Commerce Act, relating to reports and accounts, and to Section 20a concerning the issue of securities by carriers and their assumptions of financial liability; in other words, subject to regulation by the Interstate Commerce Commission as regards the requirements of Sections 20 and 20a of the Interstate Commerce Act.

The Act of 1933 greatly strengthened the authority of the Commission over the financial operations by which railroad groupings and the concentration of railroad control are being accomplished. Railroad companies and individual financiers were making large use of non-railroad holding companies, not subject to regulation by the Interstate Commerce Commission, to finance railroad consolidations, or to bring a number of railroads under a single financial organization that might be controlled by a few individuals. The holding companies were being used to prevent the consolidation of railroads according to the plan promulgated by the Commission, and also to enable railroad and other interests to carry on financial operations that the Commission could not regulate and would presumably not approve. The amendments made to Section 5 of the Interstate Commerce Act by the Emergency Railroad Transportation Act of 1933 have strengthened the authority of the Commission over railroad consolidation, and have, by bringing holding companies that may acquire control over railroad companies under its jurisdiction, given the Commission much more effective power to regulate railroad finances generally. The time had come when such authority was needed by the Commission.

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## GENERAL CONCLUSIONS

The facts presented and the generalizations made in the foregoing discussion indicate that government regulation of railroad construction and abandonment, and of the financial operations of railways and of railroad holding companies, has been effectively developed since the enactment of the Transportation Act of 1920. The regulation has been increasingly constructive and beneficial. The public in general, the owners of railroad securities, and the railroad companies have been benefited, both during the days of elation preceding 1930, and during the subsequent years of trial and endurance. It is especially fortunate that the government regulation of railroad abandonments and of railroad financing had been provided for and public policy had been well developed before a severe and prolonged business depression, and a contemporaneous rapid increase in the traffic handled by the highway and pipe-line competitors of the railroads made the maintenance and improvement of railroad services and the solution of the financial problems of the railroads more difficult than they had been even during the adverse years following 1873 and 1893. The Commission's prior experience enabled the Commission to be more helpful than it could otherwise have been in the administration of the railway provisions of the Reconstruction Finance Corporation Act of January 22, 1932, and the Bankruptcy Acts of March, 1933, and August 27, 1935. Moreover, the additional authority given the Commission, by the Emergency Transportation Act of June 16, 1933, to regulate the financing of railroad consolidations, and the power given the Commission by the same act to regulate such non-railroad companies as purchase control of railroads, have been of public benefit.

To regulate railway financiering as comprehensively as has been provided by the Transportation Act of 1920 and later statutes is not without the danger of imposing undue limitation by the Government upon private initiative and management. The railroads are corporate enterprises; their successful management requires the opportunity and incentive of responsible directorates and officers to formulate and carry out financial and other management policies not inconsistent with the public in-

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terest and that are in accord with general standards and regulations established and enforced by government authority. The difficult task of making the government regulation of railroad financing effective and constructive, while avoiding undue restriction of corporate initiative and enterprise, has been accomplished by the Commission. Its policy, practice, and procedure have been beneficial to the public, investors, and the railroads.

Can the policy of government regulation of financing that has been successfully developed with reference to railroads be applied effectively and helpfully to other carriers that now are or will be regulated by the Federal Government? An answer to that question will be attempted in the discussion of the regulation of carriers by water, highway, and air.

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## CHAPTER X

### GOVERNMENT REGULATION OF RAILROAD SERVICE

IN the United States, Great Britain, Canada, and many other countries, railroad corporations are chartered by government authority and are thus vested with the right to provide the facilities and perform the services of transportation. Thus far, with few exceptions, the railroads in the United States have been chartered by the states; but as practically all railroads are interstate carriers, or originate and accept traffic that crosses state boundaries, their facilities, services, charges, and corporate practices are regulated by the Federal Government in the exercise of its authority over interstate commerce and its agencies.

Inasmuch as the Government creates railroad corporations to serve the public, to render a service of a public nature, the Government may and should concern itself with the services rendered as well as with the rates charged for the performance of the services rendered and with the labor policy, financial affairs, and intercorporate relations of the regulated corporations. The general purpose of the Government in the regulation of the services, as well as in the regulation of other railroad practices and policies, will naturally be twofold, preventive and constructive. Preventive regulation will concern itself mainly with measures to increase safety, while constructive regulation will aim to increase economy and efficiency of services.

As will be pointed out, the Federal Government, for more than four decades, has, by legislation and efficient administration, sought with increasing success to minimize the risks of railroad traffic and travel. The Government, with the coöperation of the carriers, has made the railroad the safest of the several means of transportation. This having been accomplished, the Government is seeking earnestly to further and supplement the efforts of the railroads to reduce the expenses and increase the efficiency of their services. The exigency of the recent situation of the rail-

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roads, resulting from a sudden decrease in traffic, accompanied by a rapid expansion of motor transportation, has spurred the Government on in its effort to make its regulation of railroad service constructive and helpful to the carriers. One evidence of this was the enactment of the Emergency Railroad Transportation Act of June 16, 1933, and the activities that followed in consequence thereof.

### ACTIVITIES OF THE CARRIERS IN IMPROVING AND REGULATING THEIR SERVICES

It is those who own and operate the railroads that have the greatest incentive to improve service. Carriers individually and collectively have ample reason for seeking to enlarge the scope of the services that the railroads can perform, for endeavoring to add to traffic, to reduce the total cost and the unit cost of service, and to increase net earnings and profits. Unfortunately, many of the measures by which economy and efficiency of service may be increased can be taken only by the coöperative or common action of the carriers; and it is not easy for a large number of carriers, each of which has built up its facilities and services during a régime of competition and each of which feels responsible, first of all, to its creditors and stockholders, to acquire the habit of collective action for the common good of railroad carriers as a whole. As is well known, however, American railroad companies, due in large measure to the necessitous condition created by a prolonged business depression, have come to realize that they must, in the future, coöperate more than they have in the past; and, to bring this about, they in 1934 took the wise step of consolidating their two former general coöperative organizations, the American Railway Association and the Association of Railway Executives, into the Association of American Railroads with larger authority to deal with matters of common interest than its predecessors possessed. Thus the carriers by more effective organization, and (as will be pointed out presently) the Government, by the Emergency Railroad Transportation Act of 1933 and the activities of the former Coördinator of Transportation, have both acted constructively to increase the efficiency and economy of railroad services.



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The efforts of the railroad carriers to reduce the cost and increase the efficiency of their services by improvements in the power of locomotives have been continuous from the early days of railroads, and have been little less than phenomenal during the short period since 1920. The builders of locomotives have coöperated with the users of power to develop new types of locomotives, steam, electric, and diesel, and to increase efficiency both in the generation and in the application of power in each power unit. This is not the place to describe the improvements that have been made and are being worked out to increase the economy and efficiency of the power by which railroad transportation services are performed. It is sufficient to refer to what has been accomplished, and to state that if economic conditions do not prevent, and if government requirements do not unduly hamper, the mechanical or power prerequisites of economy and efficiency of railroad transportation services will be fully met. Outside of enforcing safety requirements, the Government has no problem of regulation connected with increasing the power efficiency of railroad transportation.

Less consideration has been given by rail carriers to the improvement of freight and passenger equipment than has been given to the development of more efficient power units, but much has been done to adapt equipment to the several kinds of transportation services to be rendered. The shrinkage in rail traffic, due to adverse business conditions and to the success of the automobiles and trucks in diverting from the railroads to the highways a large volume of passenger and freight traffic, has caused rail carriers and equipment makers to seek for lighter and stronger materials for freight- and passenger-car construction, and to study more closely the transportation requirements of different kinds of traffic for the purpose of adapting equipment more definitely to the services to be rendered.

Contrary to uninformed opinion sometimes expressed, the railroads individually, and especially through the American Railway Association, which in 1934 was incorporated in the Association of American Railroads, have long carried on extensive research and experimentation to improve equipment and services. In 1933, the American Railway Association published a volume entitled, *The*

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*American Railroad In Laboratory*, which contained a description of research being conducted in 70 subjects pertaining to locomotives, 65 subjects pertaining to freight cars, and 38 subjects having to do with passenger cars. There was also a description of research being carried on in 99 other subjects, including mechanical methods and tools, engineering, signals, and telegraph and telephone. As a result of these research activities and experiments, frequent improvements are being made in the construction and equipment of standard freight cars and new types of cars are being built to handle special kinds of traffic—cars for transporting automobiles, cars for freight containers, and cars for other shipments requiring special equipment.

The rapidity with which passenger cars and locomotives are being adapted to changing service conditions is especially noteworthy. Air conditioning of passenger coaches is proceeding at an accelerating rate. At the end of 1936 there were more than 8,000 air-conditioned passenger coaches and Pullman cars in service, the air-conditioning equipment having required an expenditure of over 45 million dollars. Alloy steel is being used to lighten the weight of passenger coaches; and several railroads are experimenting with high-speed stream-lined trains, one type of such trains being the gas-electric and diesel-electric articulated trains designed for potential speeds of over 100 miles an hour. Less radical, but important from the standpoint of safety and comfort of travel, are the improvements in equipment that have resulted from the construction of stronger wheels, the use of roller-bearings, changes in passenger-car designs, and in train heating and lighting.

The improvements in freight and passenger equipment referred to in the foregoing paragraphs are illustrative of the efforts being made by the carriers to render more efficient, economical, and attractive services. By means of their greater coöperation, made possible and probable by the organization of the Association of American Railroads, the carriers will be able to quicken their changes in equipment and services. If better traffic and revenues permit, rapid progress will be made in the next few years. While government regulation of railroad service need not concern itself with technical improvements, it can be helpful to the public and

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the carriers through the administration of safety-appliance laws, through the activities of the Bureau of Service of the Interstate Commerce Commission, through the furthering of the coöperation of the carriers, and by pointing out changes in operating methods and practices that will reduce costs and improve service.

### REGULATION OF EQUIPMENT AND OPERATION IN THE INTEREST OF SAFETY

Government regulation of railroad service includes the adoption and enforcement of appropriate regulations as to the equipment that may be used in performing the service. While each railroad company is interested in devising and installing equipment that will increase the safety of its employees and of those served, each railroad acting separately can accomplish but little in introducing safety appliances. Freight cars are freely interchanged by carriers, and to some extent passenger cars pass from one line to another. At the present time, through the past activities of the several technical divisions and the car service division of the American Railway Association (which in 1934 was succeeded by the even more potent Association of American Railroads), the carriers act jointly and effectively in adopting, and requiring the use of, safety appliances. Through the associated action of the carriers, the risks of travel have been reduced to a lower point than was formerly thought possible of attainment, and the accidents to those employed have greatly lessened, although it would seem possible to decrease further the mishaps to employees.

Before the carriers had so organized as to coöperate effectively in standardizing railroad safety appliances and in bringing about or compelling their general adoption, it was necessary for the Government to enact mandatory statutes; and naturally such laws dealt first with automatic couplers and train brakes. The first safety-appliance law was the Act of March 2, 1893, "To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other pur-

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poses." The statute prohibited all interstate railroads, after January 1, 1898, to use a locomotive "not equipped with a power driving-wheel brake and appliances for operating a train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

The statute also required cars to be equipped, by January 1, 1898, "with couplers, coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." By July 1, 1895, unless the Interstate Commerce Commission should order otherwise, the carriers were required to have all freight cars equipped "with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." The Act further authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height of draw-bars for freight cars, and the Commission was empowered to require all carriers to adopt the standard height. After July 1, 1895, all cars used in interstate commerce were to have draw-bars of the standard height adopted by the Commission. The statute fixed the penalties for violation and authorized the Commission "after full hearing and for good cause" to extend the time within which any common carrier must comply with the Act.

For several years following the enactment of the Safety-Appliance Law of March 2, 1893, there was a business depression and the Commission was obliged to extend the time within which the carriers should meet the requirements of the Act. By a law passed in 1903, the Act of 1893 was made to apply to vehicles engaged in interstate commerce in the territories and the District of Columbia, and the Commission was authorized to increase, from time to time, "the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes" operated from the locomotive. An act adopted in 1910, provided that, after July 1, 1911, "all cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with

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such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders." The Commission was given power to prescribe what must be done to meet the requirements of the Act of 1910, and the Commission was also authorized to extend the time within which a carrier must comply with the law.

These details as to the provisions of the Act of 1893 as amended by subsequent statutes indicate how the Government was able by statutory requirements and administrative procedure to bring about such changes in train operation and in equipment as to increase safety in the railroad transportation service. To enable the Interstate Commerce Commission to enforce the statutes and exercise its discretionary powers intelligently, the Commission, by a provision in the Sundry Civil Appropriations Act, and by subsequent acts, was authorized to employ "inspectors to execute and enforce the requirements of the Act" of 1893.

In addition to the Act of 1893, as amended, requiring railroad carriers to substitute train brakes for hand brakes and to equip cars with standard automatic couplers and with other safety devices, there was a series of other laws enacted, most of them during the 10 years following 1900, to promote safety in the transportation service.

In 1905, Congress, "to encourage the saving of life," authorized the President to prepare bronze medals of honor to be bestowed by him "upon any persons who shall hereafter, by extreme daring, endanger their own lives in saving, or endeavoring to save, lives from any wreck, disaster, or grave accident, or in preventing or endeavoring to prevent such wreck, disaster, or grave accident, upon any railroad." The President acts in individual cases upon a recommendation of the Interstate Commerce Commission.

Two years later, an Hours-of-Service Act was adopted by Congress "to promote the safety of employes and travelers" by providing that persons engaged in or connected with the movement of any train should not be in continuous service more than 16 hours in a 24-hour period, and such employees who have been on duty 16 hours shall have 10 hours off duty. The law also provided that, except in cases of emergency, train despatchers should not

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be permitted to remain on duty more than nine hours at stations operated day and night, and not more than 13 hours, out of 24, in all towers and stations operated only during daytime.

In 1908, the Ash-Pan Act was passed by Congress "to promote the safety of employees on railroads." After January 1, 1910, it became unlawful "to use any locomotive in moving interstate or foreign commerce, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive." The Interstate Commerce Commission was to enforce the Act.

In 1910, Congress passed "an Act requiring common carriers engaged in interstate and foreign commerce to make full *reports of all accidents* to the Interstate Commerce Commission, and authorizing investigation thereof by said Commission." The law requires the reports to be made monthly in such form as the Commission may prescribe.

The following year the Boiler-Inspection Act was passed by Congress compelling carriers "to equip their locomotives with safe and suitable boilers and appurtenances thereto." This Act, as supplemented by others enacted in 1915 and 1924, provides that "the locomotive, its boiler, tender and all parts and appurtenances thereof" shall be in condition for safe operation and shall be inspected from time to time by government officials. The inspection is in charge of a chief inspector and two assistant inspectors, appointed by the President; their office shall be in Washington, and the Interstate Commerce Commission shall provide them with "such legal, technical, stenographic and clerical help" as they may require. To carry out the provisions of the Act of 1911, the Interstate Commerce Commission established the Bureau of Locomotive Inspection with a staff of inspectors.

In 1921 Congress amended the penal laws of the United States by a Transportation of Explosives Act that prohibited the transportation of high explosives upon a vessel, car, or vehicle operated in carrying passengers by a common carrier engaged in interstate or foreign commerce. Certain provisos were made allowing the transportation of munitions and so forth, and the Interstate Commerce Commission was required to formulate and enforce regula-

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tions for the safe transportation of explosives and other dangerous articles named in the Act.

Congress has also legislated concerning block signals and automatic train control. In 1906, Congress, by joint resolution, directed the Interstate Commerce Commission "to investigate and report upon the necessity for block-signal systems and appliances for the automatic control of railway trains in the United States"; and, by the Act of 1913 and acts passed at later dates, special appropriations were made to enable the Commission to carry on its investigations and make tests. The investigations and tests made by the Commission caused Congress to include in the Transportation Act of February 28, 1920, a provision authorizing the Commission to order any carrier by railroad subject to the Interstate Commerce Act "to install automatic train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment." In June, 1922, the Commission adopted specifications and ordered 49 railroads to install automatic train-stop or train-control devices upon a full passenger locomotive division, by January 1, 1925. This order was followed by others in 1924, with the result that the Commission was able to state, in its Annual Report for 1929, that "all installations required by our orders of June 13, 1922, and January 14, 1924, have been completed," that the Commission's engineers, after tests, had approved 77 of the installations, with exceptions and recommendations as to details, and that by orders of the Commission and, by action of the carriers in addition to the Commission's requirements, 11,453 miles of road, 20,239 miles of track, and 8,904 locomotives had been equipped with automatic train-stop or train-control devices. However, in its report for 1929, the Commission also stated that "as a result of an investigation and hearing held on our own motion during February and April, 1928," it had, in November, 1928, issued a report stating that it would not require further installation of train-stop or train-control devices; and since 1928, and particularly in 1932, 1933, and 1934, numerous large railroad companies

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have been permitted to discontinue, until further orders, the maintenance and operation of train-control devices. The carriers have been obliged to economize in capital expenditures and in maintenance and operating expenses; and it has become evident that the carriers through the American Railway Association and its successor, the Association of American Railroads, are best qualified to develop train-control devices and to bring about uniform action. About half the road mileage of the railroads is equipped with block signals, but there has been some decrease in the mileage since 1932. It is to be hoped that this will be only a temporary decrease.

The administration and enforcement of the safety-appliance laws are vested in the Bureau of Safety and the Bureau of Locomotive Inspection. The Interstate Commerce Commission first "grouped its work of administration of safety appliance and kindred acts" in a division of safety. This was in 1914, and for one year the inspection of locomotive boilers was included in the work of the Division of Safety. In 1917, the Commission reconstructed its general administrative organization and changed its "divisions" into bureaus. The Bureau of Safety was created, and a separate Bureau of Locomotive Inspection was established in place of the Division of Locomotive-Boiler Inspection that had been set up in 1915, this change in title and duties being due to the extension of the law to include the inspection of all parts of locomotives.

### THE BUREAU OF SERVICE OF THE INTERSTATE COMMERCE COMMISSION

In May, 1917, Congress enacted a car-service law which was amended and made somewhat more comprehensive by the Transportation Act of 1920.<sup>1</sup> The law as amended has made it the duty of every carrier subject to the Act "to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service."

<sup>1</sup> Now constituting paragraphs (10) to (17) inclusive of Section One of the Interstate Commerce Act as amended. The Act of 1917 is called the Esch Car Service Act.



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The rules and regulations were to be filed with the Interstate Commerce Commission which was given authority to fix the compensation to be paid by a carrier for the use of equipment owned by another carrier. The Commission was also empowered, in case of a shortage of equipment or other emergency, to suspend the carriers' car-service rules, to take over control of car distribution, to require joint use of terminals, and to determine the routing and the priority of movement of traffic.

As the Commission states in its Annual Report for 1918, it had not previously, with the exception of enforcing the safety acts, been assigned "the role of railway management or direction of operations." The Commission created a car-service bureau, July 9, 1917, and the carriers through the American Railway Association established a commission on car service.

The Commissioner's Car Service Bureau had but little to do at the outset other than to give directions to the carriers' Commission which took charge of car distribution. At the end of 1917, the President, acting under authority of an act approved August 29, 1916, took over the operation of the railroads; and, on February 6, 1918, the Director-General of Railroads created a car service section of the Division of Transportation of the Railroad Administration. The carriers' Commission on Car Service and its staff were taken over by the Car Service Section of the Division of Transportation which controlled the distribution and use of cars during the period of government operation of the railroads.

When, by the Act of February 28, 1920, the railroads were returned to their owners for operation, car distribution again came under the control of the carriers' Car Service Commission (changed to Car Service Division, September 3, 1920) of the American Railway Association, subject to the regulatory jurisdiction of the Interstate Commerce Commission, acting under the enlarged powers conferred by the Transportation Act of 1920. The American Railway Association promulgated a code of car-service rules, March 1, 1920, the date upon which the Government returned the railroads to their owners for operation, and the Car Service Division of the Association began functioning; but in April the railroads were confronted with a traffic situation that they feared they could not handle. Before the railroads could re-

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store to normal their equipment impaired during the war, there was a large increase in traffic, and at the same time a strike of yardmen and switchmen in many cities greatly interfered with the use and movement of cars. The carriers on May 15, 1920, petitioned the Commission to exercise its emergency powers under the Transportation Act of 1920 and take control of car service and distribution. The emergency conditions "were largely overcome by December 1, 1920," and the carriers again took charge of car service through the Car Service Division of the American Railway Association.

In 1922, the Commission again exercised its emergency powers over car service. On the first of April that year, the bituminous and anthracite coal-miners' union, and on July first the railroad shopmen, went on a strike which lasted several months and caused the railroads much difficulty in securing locomotive fuel and in maintaining their equipment. The Commission met the situation, in July, by ordering carriers to forward freight to destination by the most available routes without regard to the routing specified by shippers, and to give priority of movement to foods, perishable products, fuel, and other designated commodities of greatest necessity to the public. The bituminous miners began returning to work August 15th, the anthracite miners September 11th, and the shopmen terminated their strike on some lines September 15th. The Commission was able to assist the carriers and to protect the public through the summer and autumn in spite of the exceptionally heavy volume of traffic. The business losses were large, but would have been much greater had not the Commission possessed and exercised its emergency powers over car service. The Commission stated "this emergency was satisfactorily met through the active coöperation with us of Federal, State, and local fuel administrators and railway officials both direct and through the Car Service Division of the American Railway Association."<sup>2</sup>

Previous to 1925, as the Commission states in its annual report for that year, the activities of the Bureau of Service had related "primarily to car service"; but on April 1, 1925, the Commission enlarged the scope of the bureau's work and "subdivided it into three sections, those of car service, of efficiency and economy of

<sup>2</sup> Annual Report of the Interstate Commerce Commission for 1923, p. 53.

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operation, and of transportation of explosives and other dangerous articles, respectively." The section of efficiency and economy of operation was established to assist the Commission in carrying out the rate-making provision of the Transportation Act of 1920 requiring the Commission so to adjust and prescribe railroad rates as to enable the carriers to earn a fair return upon the aggregate value of their property, "under honest, efficient, and economical management and reasonable expenditures for maintenance of way."<sup>3</sup> While the Commission did not have the "organization of technical experts" that would be required "to go exhaustively into the question of efficiency and economy of railroad management," it was able to inform itself as to numerous kinds of railroad service and to take administrative action where and when needed to minimize congestion, or to require carriers to coöperate in greater measure with each other and with shippers than they otherwise would in rendering their services.

The organization during 1924 and 1925 by the Car Service Division of the American Railway Association of 12 (two have since been added) regional advisory boards enabled the Commission's section of efficiency and economy of operation to function more intelligently and helpfully. These boards are composed of representatives of the carriers and the shippers in each of the major traffic sections of the country. Each board has a committee for each important kind of traffic. The boards meet each three months and make careful, and what have proven to be accurate estimates of the volume of different categories of traffic and the equipment required by each category during the ensuing three months.

Besides giving attention to the current car-service demands of different sections of the country and of such kinds of traffic as may have special or emergency needs, and furthering the service coöperation of the carriers, the Bureau of Service carried on an investigation over several years, beginning in 1925, of the practice by many carriers of having repairs to locomotives, cars, and other equipment made in shops other than their own. The carriers

<sup>3</sup> The rule of rate-making was amended by the Emergency Railroad Transportation Act of 1933, but that also required the Commission to consider what is "adequate and efficient railway transportation service."

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were required to file with the bureau copies of contracts for such repairs, and the bureau was able to show in some instances that expenditures by carriers appeared to be excessive, and that the repairs could be made at less expense in company shops.

The annual reports of the Commission, for 1933 to 1936, show that the Bureau of Service has engaged in many activities and has carried on investigations at the request of the Treasury, Interior and Agricultural Departments, the Reconstruction Finance Corporation, the Coördinator of Transportation, and the Association of American Railroads. The Bureau of Service coöperated with the Coördinator of Transportation by "participating in the investigation of matters pertaining to labor relations, maintenance of equipment, consolidation of shops, economy of operation, and accessorial services which carriers perform."

The foregoing statement does not cover all the activities of the Bureau of Service, but it is sufficient to indicate the kind and scope of the assistance that the Government can render to the carriers in the regulation of service. Each of the many railroad managements is concerned first of all with its own special problems and with its competitive relations with other railroads and with carriers other than railroads. A government bureau of service, if constructively administered, can help the carriers with the problems they have in common and can assist in bringing about a reduction in expenses and an increase in efficiency and economy of operation.

### INVESTIGATION BY THE INTERSTATE COMMERCE COMMISSION OF PRACTICES OF CARRIERS BY RAILROAD

In July, 1931, the Commission upon its own motion entered upon "an investigation [in Ex Parte No. 104] concerning practices of carriers by railroad, which affect operating revenues or expenses." The purpose of the Commission was not to make "an exhaustive investigation into the economy and efficiency of railroad management and operation," but to investigate definite practices "brought about by the pressure of competition." The Commission stated that, "In such situations it is often difficult for the carriers to discontinue a particular practice, even if they

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realize that it is exerting an adverse effect upon income, but this difficulty may be overcome by a public disclosure of the facts, provided the facts show need for discontinuance.”

The investigation was divided into five parts dealing with (1) railroad fuel; (2) terminal services of Class I carriers; (3) construction and maintenance of private side-tracks for shippers; (4) traffic expenses; (5) private freight cars. Later a sixth subject of investigation was added, covering warehousing and storage of property by carriers at the Port of New York, N.Y. Questionnaires were sent out when the inquiry started and hearings were held during the following two years. Numerous decisions and orders of the Commission dealing with specific practices and individual companies have been made during the four years ending with 1936. Some of the Commission's orders have been set aside by the courts, but in general the Commission's rulings have been upheld and much has been accomplished.

Among the practices that the Commission, in 1931, selected for investigation were matters that the Coördinator of Transportation, whose office was created by the Emergency Transportation Act of June 16, 1933, would need to investigate and act upon in performing the duties imposed upon him by that law. Accordingly, when the Commission had prepared its report upon Part One of the investigation (railroad fuel), the report was referred to the Coördinator of Transportation who referred it to the three regional coördinating committees of the carriers that had been constituted in accordance with the terms of the Act of 1933. Likewise, the Commission made an analysis of the facts obtained from the carriers regarding Parts Three and Four of the investigation—construction and maintenance of private sidings for shippers, and traffic expenses—and turned the data and analyses over to the Coördinator. The data and analyses thus received by the Coördinator were of assistance to him and his assistants in making their investigations and in preparing reports that have favorably influenced the practice of the carriers. The Commission, in 1933, also referred to the Coördinator of Transportation for his investigation, Parts Three and Four of Ex Parte 104, the subjects having to do with the construction or maintenance of private side-tracks for shippers, and with traffic expenses.

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On May 28, 1935, the Commission issued its first report upon Part Two, terminal services of Class I carriers, setting forth under four headings the terminal services for which the carriers shall make charges in addition to the regular freight rates. The purposes of the decision were to prevent unfair discrimination and to protect the carriers' revenues. The Commission on July 2, 1934, rendered a decision and issued an order concerning Part Five, private freight cars. The investigation of this subject has been consolidated with an investigation of privately-owned refrigerator cars. The Commission found that shippers were leasing cars of private-car owners for less than the amount the shippers using the cars received from the railroads in car-mileage payments. Such shippers thus, in effect, paid less for transportation than was paid by shippers using railroad-owned cars for like services. The Commission ruled (201 I.C.C. 323) that

Payment in whole or in part to *shippers*, including meat packers, of mileage allowance by railroads, either direct or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation . . . at less than the published rates [which is unlawful, and] any allowance paid to the *shipper-owner of private cars*, including meat packers and their operating subsidiaries or agents by railroads for the use of such cars in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates.

The Commission found in the investigation of Part Six, warehousing and storage of property by carriers at the Port of New York, that, as a result of inter-railway competition, the railroad carriers reaching New York were providing shippers with warehouse and storage facilities at less than the cost of providing the warehousing and storage. The carriers were doing this to secure the traffic of large shippers; and, for the same reason, some carriers were also renting to shippers space in stations, piers, or warehouse buildings at less than the prevailing rental rates. The Commission ruled (198 I.C.C. 134) these practices "not to be in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest." The respondent carriers were, however, granted further hearings, and the final adjudication of the controversy was pend-

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ing in December, 1937, the Commission's order having been suspended by a Federal court.

In his investigation of railroad fuel purchases—the first of the six investigations above referred to—the Director of the Commission's Bureau of Service found that many railroads were paying more than the commercial cost of fuel and other supplies in order thereby to secure the traffic of those from whom purchases were made. The Director stated in his report that “the custom of reciprocal buying in return for supposed traffic advantages is one which permeates the railroad industry, and when indulged in by all railroads, as is inevitable once such a custom is started, is of advantage to none and of injury to all.” When the Coördinator of Transportation, October 6, 1933, transmitted this report to the Regional Coördinating Committees of the Carriers, he emphasized the necessity of breaking up, through united collective action, the practice of trading purchases for traffic. These practices had resulted from the intense competition of the carriers for traffic, and the report of the Director of the Bureau of Service and the admonition of the Coördinator of Transportation gave the carriers a needed incentive to put an end to an indefensible practice.

### RECOMMENDATIONS OF THE COÖRDINATOR OF TRANSPORTATION CONCERNING EFFICIENCY AND ECONOMY OF RAILROAD SERVICE

The Emergency Transportation Act of June 16, 1933, created the office of Coördinator of Transportation, provided for an appropriate staff of assistants, and authorized the Coördinator to appoint three regional coördinating committees of the carriers to coöperate with him in giving effect to the statute. The purposes of the law were to reduce transportation costs, to encourage and promote action by the carriers (1) to avoid unnecessary duplication of services and facilities, (2) to control allowances, accessorial services, and charges therefor, and (3) to avoid other wastes and preventable expenses. Other purposes of the law were “to promote financial reorganization of the carriers,” and “to provide for the immediate study of other means of improving conditions surrounding transportation in all its forms and the

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preparation of plans therefor." The Coördinator of Transportation was to submit his reports and recommendations to the Interstate Commerce Commission and the "Commission shall promptly transmit such recommendations, together with its comments thereon, to the President and to the Congress."

We are concerned in this discussion with the Coördinator's investigations and recommendations regarding railroad service. Two divisions of the organization set up by the Coördinator were the Section of Transportation Service and the Section of Car Pooling. The Section of Car Pooling made an investigation and submitted a report with recommendations; and the Section of Transportation Service, with the assistance of advisory committees composed of representatives of the carriers and of other experts, made three investigations, each culminating in a comprehensive and instructive report. One of the three reports of the Section of Transportation Service dealt with Merchandise Traffic and Services and was issued in March, 1934; another report was upon Passenger Traffic and Services, which was published in January, 1935; while the third investigation and report, which are the most comprehensive of all, are concerned with Carload Freight Traffic and Services, and were completed in May, 1935.

The reports just mentioned, when completed, were sent by the Coördinator of Transportation to the carriers' three Regional Coördinating Committees with the request that the committees consider the reports and recommendations as to changes in railroad operation and services and give the Coördinator their conclusions as to the merits of the recommendations. The reports were studied not only by the Coördinating Committees of the carriers, but also by the appropriate divisions of the Association of American Railroads, which, since its organization in 1934, has been the body to which the railroad carriers as a whole look for decision and guidance in matters involving collective action.

The recommendations made to the carriers by the Coördinator of Transportation, if carried out, would require fundamental changes in car service, traffic management, equipment used, and the services rendered by the railroads. The changes recommended applied to less-than-carload freight, passenger services, carload or general freight, and to the pooling of freight-car equipment;



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and it was the opinion of the Coördinator, and his able assistants and collaborators who had prepared the reports that were submitted to the carriers, that the condition of the railroads was so exigent that their future success and prosperity necessitated not minor but radical changes in the service methods and practices that have been developed in the past during a long period of active and publicly enforced intercarrier competition. The changes recommended grew out of the conviction of the investigators that the railroads do not now need to contend with each other for traffic, but do need to adopt the most efficient and economical methods of operation and service performance to meet the competition of highway vehicles and carriers.

The changes in methods that, in the opinion of the Section of Service of the office of the Coördinator of Transportation, must be made by the railroads to obtain a larger tonnage of less-than-carload or merchandise freight were especially revolutionary. The changes recommended, as stated in the Merchandise Traffic Report, March, 1934, were that the rail carriers should:

1. Consolidate rail L.C.L. express, and forwarder traffics and pool all rail merchandise services into two competing merchandise agencies, each operating throughout the United States, of comparable traffic and financial strength, owned by the railroad companies which respectively serve them, operated by an independent management in which the public is represented, under contracts encouraging direct and economical routing, but protecting the revenues of each participating carrier.

2. Collect and deliver merchandise at the patron's door, and transport it in shock-proof equipment at over-all speeds in excess of 20 miles per hour.

3. Simplify classification, liberalize packing requirements, and adapt the express system of charges to all merchandise traffic by substituting for present scales a scale based upon cost plus a fair profit.

4. Coördinate rail and highway transportation by contract, joint rates, lease or ownership, so that merchandise will be concentrated at and distributed from a limited number of key concentration stations by highway and moved between such stations by rail in car lots.

The recommendations made by the Section of Transportation Service as to needed changes in the passenger services and charges of the railroads are hardly less far-reaching than those made as to merchandise freight and express services. The Passenger Traffic Report, January, 1935, makes 19 recommendations which are

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grouped under four headings: (1) modernize service, (2) eliminate waste, (3) promote travel, and (4) coördinate transportation.

Under the first caption the railroads are advised to establish frequent and fast *local service* (coördinated with highway carriers) at 1½ cents per mile as the basic fare; "to establish for the thrifty distance traveller, frequent speedy, intercarrier *limited service* at a 2-cent basic fare"; a high-speed "*reserved service* at a 3-cent basic fare, including berth"; and "a limited amount of highspeed *de luxe service*, at a 5-cent basic fare including room and all incidentals." Discounts from the regular fares "for families, parties, traveling salesmen, lodges, schools and similar groups" are recommended, as also are all-expense trips and train cruises.

To eliminate waste in their passenger services, the railroads should consolidate their individual "competitive traffic departments into a single joint organization"; "eliminate complex, multifarious and unnecessary tariffs"; consolidate their baggage, express, and merchandise traffics using therefor either passenger or freight trains; take over from the Pullman Company the "reserved accommodation service" and "popularize sleeping and dining privileges as an integral part of reserved and de luxe services," the basic fare to include reserved accommodations; unify stations and terminals, consolidate duplicate train services for which they are used, and "substitute highway transportation for rail local and limited services, and air transportation for rail de luxe services, wherever travel volume is insufficient to warrant the larger rail vehicles."

Under the heading "promote travel," it is recommended that the railroads "vest exclusively in the Association of American Railroads, market research and analysis, design and prescription of service, schedules and routes; pricing, tariff making and publication; and division and clearing of joint revenues." The individual carriers should also look to the Association for promoting travel "and for the planning, conduct and supervision of the sale of passenger transportation."

The coördination of transportation, the fourth division of the recommendations, should be the task of the Association of Amer-

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ican Railroads, which should create "a single nationwide passenger service, by appropriately unifying railway facilities, terminals, equipment, trains and schedules, and coördinating, by contract or joint rates and arrangements, railway, highway, airway, and waterway transportation."

The major service performed by American railroads is the transportation of carload freight, and the importance to the railroads of carload freight as compared with their merchandise freight and their passenger traffic has been increased by the competition of highway vehicles and carriers that have taken from the rails the larger part of the less-than-carload freight and of the passenger traffic. Accordingly the recommendations made by the Section of Transportation Service as to improvements and economies in the carload freight services of the railroads are of especial significance. This report, as stated above, was issued in May, 1935, when the traffic conditions and prospects of American railroads were much less favorable than they have since become. Had the report been completed even two years later, its general tone might have been more optimistic.

The conclusions and recommendations of this Freight Traffic Report deal with five general phases of the subject—with the traffic, service, charges, and operations, and with coördination, both inter-railway and intercarrier. The major findings presented in the report were as follows:

The general conclusion as to future railroad traffic is that it has been reduced by "the relocation and decentralization in industry, change in power and fuels, and increase of private transportation" and this reduced traffic tends to become unprofitable to the railroads as a result of "competitive rate-making and service, and utilization of obsolete equipment, plant and methods."

Concerning service, the rather obvious generalization is made that "modern business demands celerity in movement, door-to-door service and equipment adapted to business needs." The freight service is deprived of its superiority by too infrequent schedules, and too much time is lost by the frequent yarding of trains, and by the interchange of freight.

As regards railroad charges the report recommends "that all

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commodities be classified objectively into a limited number of groups," and that in so doing the controlling consideration should be "the maximum volume of profitable traffic, excluding consideration of cost characteristics." Moreover, present tariff complexity should be reduced by the "unification of rate systems and publishing authorities, by simplifying commodity classification, and by grouping carrier routes into a limited number of definite channels."

Among the 14 generalizations concerning railroad operations is one that might be expected, that to economize in line-haul costs by operating long trains the railroads have so increased yard costs that they are greater than road costs. At the same time, road-line expenses are made unnecessarily high by the yarding of trains en route and by "the distribution of freight from terminal centers by way trains." The report also emphasized the unwisdom of allowing shippers to route their shipments. This free-routing privilege (now assured shippers by Federal statute) "leads to preferential treatment of shippers, undue prolixity and complexity in tariffs, circuitous routing, unnecessary interchanges, excessive terminal delays, and thereby burdens industry, as well as the carriers, with avoidable waste."

The Freight Traffic Report also recommends full coördination of transportation agencies and facilities. All forms of transport "should be integrated by joint rates, interchangeable equipment, and common facilities, under a program designed to use each form in the field of its greatest utility," and the report recommends that "whenever necessary for serviceable, efficient, or economical operations, all carrier equipment, terminals, and facilities should be used jointly and interchangeably by carriers of all types under appropriate and fair user arrangements."

In submitting the Freight Traffic Report to the carriers' Regional Coördinating Committees for their consideration, the Coördinator of Transportation stated that "some of these conclusions and suggestions will be regarded as radical or revolutionary," and he added, "we offer . . . not recommendations but suggestions" but with the "conviction that modern commercial needs and competitive transportation conditions imperatively demand a thorough reëxamination of the operating methods of

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the railroads, of their service and equipment, and of their rate structure." This conviction of the former Coördinator of Transportation is probably shared by all who are seeking to adapt the railroad freight service to present business conditions and transportation requirements. It may well be that the suggestions in the Freight Traffic Report will be helpful in developing and giving effect to a general plan of improvement.

The Section on Car Pooling of the organization set up by the Coördinator of Transportation made a thorough investigation of a most important subject, and in October, 1934, made a report which presented detailed information as to present uneconomical practices in the use of railroad equipment, and recommended the adoption of a plan of car pooling, the purpose of which would be to reduce the amount of capital required to provide railroad rolling stock and to lessen the cost of operation. The conclusions to which the investigation led were:

1. That there is a substantial and increasing volume of empty-car mileage in excess of that which is necessary in the equalization of unbalanced traffic and the orderly and efficient relocation of freight cars.

2. That the methods hereto applied in the regulation of freight-car interchange are ineffectual in the avoidance of these unnecessary and wasteful movements.

3. That the defects in the methods are fundamental and cannot be corrected without basic changes in the regulations.

4. That the coördinated operation of interchange freight cars offers the best practical solution for the correction of existing defects.

5. That the pooling of freight cars would immediately effect one of the principal benefits claimed by those who urge railroad consolidations without waiting for the final determination of the major features of such consolidation.

The recommendations made in the report on car pooling were:

1. That ordinary railroad box-cars should now be assigned to a general pool, the several railroad companies retaining ownership of the cars, and that "other classes and types of railroad-owned and private-line cars should be added as experience in the operation of the pool may warrant its expansion."
2. That the ultimate objective of the pool should be the ownership of the cars by the pool, which should have facilities for repairing cars and should maintain a supply of cars adequate to meet the needs of carriers.

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3. That the pool should be controlled by the Association of American Railroads. 4. That the pool compensate the car owners for the cost of the cars placed in the pool, maintain cars in a suitable condition for service, distribute cars equitably among railroads, and "coördinate the retirement and replacement of freight-car equipment in such manner as to insure an adequate supply and an orderly and stabilized progress of car construction." 5. That the pool collect from car users a daily car rental sufficient to compensate the owners of the cars for the capital cost or investment in the cars, and that the pool pro-rate repair costs and pool operating expenses "among participating railroads upon the basis of *car-mileage*." 6. That the central office of the pool distribute cars among districts, that the district managers allot cars to the railroads in their several districts, and that the individual railroads distribute the cars among the divisions of their lines as they do at present.

When the foregoing reports and recommendations were submitted by the Coördinator of Transportation to the Regional Coördinating Committees of the carriers, there not unnaturally developed differences of opinion among members of the committees, and it was not possible either for the Coördinating Committees or for the carriers' coöperative organization, the Association of American Railroads, to reach a prompt decision in favor of the far-reaching changes in method and manner of service performance recommended by the Coördinator and his Directors of Transportation Service and of Car Pooling. Moreover, it is probable that the financial and other effects of the business depression, while emphasizing the need of adopting the most economical methods of operation and management, also tended to cause individual carriers to pursue the policy of struggling on through the depression, competing actively meanwhile for available traffic, and to postpone, until the arrival of the hoped-for better times, making the radical changes in services involved in the adoption of extensive intercarrier coöperation. Whether or not this may be the explanation, the immediate results of the commendable effort of Congress, in passing the Emergency Transportation Act of 1933, to make government regulation of railroad service constructively helpful both to the carriers and

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the public, were less than were expected. However, the long-run results may be much larger than the immediate effects would indicate to be probable. The facts presented, and the recommendations made, by the Coördinator of Transportation can hardly fail to further the adoption by the carriers of more coöperative and more economical methods of serving the public, although the changes in operation and management may not be exactly those recommended by the Coördinator.

It was the intention of Congress that the Coördinator should compel the carriers to make such changes as he, after following the procedure prescribed by the Emergency Transportation Act of 1933, decided should be made in the interest of the public. The statute gave the Coördinating Committees of the carriers the opportunity and responsibility of giving effect to the purposes of the Act, and if the committees were unable to carry out the declared purposes of the law, by voluntary and coöperative action, they were to "recommend to the Coördinator that he give appropriate directions to the carriers or subsidiaries . . . and issue and enforce such orders, if he finds them to be consistent with the public interest." Furthermore, the Act provided that, "If, in any instance a committee has not acted with respect to any matter which the Coördinator has brought to its attention and upon which he is of the opinion that it should have acted . . . he is hereby authorized and directed to issue and enforce such order, giving appropriate directions to the carriers . . . with respect to such matter as he shall find to be consistent with the public interest." The orders of the Coördinator were to become effective not less than 20 days from the date of publication. Any interested party, either the carriers or others that might be indirectly affected, could appeal to the Interstate Commerce Commission for a suspension, amendment, or modification of the Coördinator's order.

The Coördinator did not issue orders to enforce his recommendations. The provisions of the Emergency Transportation Act that established the office of Coördinator of Transportation were the temporary part of the statute and were in effect only three years. Under ordinary economic conditions, the powers and duties that were temporarily vested in the Coördinator would

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be placed with the Interstate Commerce Commission, and it would function, as regards research and matters affecting economy of railroad management and operation, with the carriers individually, and also with carriers collectively through the Association of American Railroads.

Without expressing an opinion, one may well question whether the Coördinator, or the Interstate Commerce Commission, would have had the constitutional power to order the several carriers to turn their property in equipment over to a pool for use in such measure as the pool's rules provided. A car pool would presumably have to be established by voluntary action of the carriers. The same principle would seem to apply to the pooling of merchandise traffic services by placing such services in charge of one or two country-wide merchandise agencies. Probably, fundamental changes in passenger and in carload freight services would require voluntary action by the carriers. Such voluntary action may be found desirable and advantageous and, if so found, it can doubtless be brought about in due season through action of the Association of American Railroads through which the carriers can adopt coöperative measures. The investigations and reports made by the staff of the Coördinator and his personal influence in the future may bring about a greater degree of intercarrier coöperation than would otherwise be achieved.

### GENERAL CONCLUSIONS

The facts and details presented in the foregoing discussion indicate that the government regulation of railroad service can be, and has been, of assistance to the carriers and beneficial to the public. The aim or goal of such regulation should be the coöperation of government agencies and the carriers. While the Government can help to bring about improvements in railroad service, it is the carriers, and those who supply them with equipment and apparatus, that can and will do most to improve service. Their animating motive is definite and strong, and the purpose of government regulation should be to direct their efforts along lines that will be of largest benefit to the public as well as helpful to the interested carriers. The essential requisite of gov-



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ernment regulation of railroad service is to bring about maximum coöperation both of the Government with the carriers and of the carriers with each other. The regulation of the railroad service by the Government must always be partly corrective in purpose, but its primary aim must be constructive.

### REFERENCES

Emergency Railroad Transportation Act of June 16, 1933.

Interstate Commerce Act, as amended, Section One, paragraphs (10)-(18).

Interstate Commerce Commission, Annual Reports 1914 to date. Parts describing the activities of the bureau of safety, the bureau of locomotive inspection, and the bureau of service.

Reports issued by the Federal Coördinator of Transportation:

Merchandise Traffic Report, March 17, 1934, prepared by Section of Transportation Service, J. R. Turney, Director.

Report on Freight Car Pooling, October 22, 1934, prepared by Section of Car Pooling, O. C. Castle, Director.

Passenger Traffic Report, January 10, 1935, prepared by Section of Transportation Service, J. R. Turney, Director.

Carload Freight Service Report, May 1, 1935 (Three Volumes with Appendices), prepared by Section of Transportation Service, J. R. Turney, Director.

Safety Appliance Act of March 3, 1893, and Other safety appliance acts referred to in the text.

*The American Railroad in Laboratory* (1933), published by the American Railway Association.

## CHAPTER XI

### GOVERNMENT REGULATION OF RAILROAD LABOR

A RAILROAD company is brought into existence and incorporated in order that it may perform the transportation services permitted and required by its charter, which services, as has been explained in the preceding chapter, are in large measure regulated by the Government. The performance of service is made possible by the investment of capital and the employment of labor; and the railroad company, both in obtaining capital and in employing labor, is subject to government regulation, which by recent legislation has been increased in scope and definiteness. The administrative authority of the Interstate Commerce Commission over railroad finances was considered in Chapter IX. That discussion will be supplemented by the discussion of the government regulation of railroad labor. The subject has several phases and includes many details.

#### THE SOCIAL AND ECONOMIC IMPORTANCE OF GOVERNMENT REGULATION OF RAILROAD LABOR

The regulation of labor conditions and of the relations of employee and employer presents problems of human interest and social significance; and the regulation of railroad labor is of especial importance because of the large number of employees and because of the vital dependence of society upon the services rendered by the railroads and their employees. In 1920, there were over two million railroad employees; and, although partly by the introduction of labor-saving equipment and methods and more largely as the result of the reduction in traffic caused by a prolonged business depression accompanied by a rapid increase in the competition of unregulated carriers by highway and waterway, the number of employees was temporarily reduced by one half, it is probable that with the return of normal business con-

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ditions the labor staff of the railroads will include between a million and a quarter and a million and a half men. In 1936, the men and women on the railroad pay-rolls—the average number for the year being 1,065,970—received, in total wages, \$1,848,-498,000. The average hourly compensation per employee was 69.1 cents and the average annual earning was \$1,734. The low point in the number of employees and in annual earnings was reached in 1933, but the increase in both earners and earnings that began in 1934 has continued and will increase as railroad traffic grows. These figures are sufficient to indicate that railroad employees constitute one of the large and important units of American labor.

The social importance of the government regulation of railroad service is, however, measured less by the number of the employees affected than by the necessity of providing, if possible, for the peaceful solution of labor disputes that may result in the tie-up of railroad transportation. Although the present country-wide system of good highways and the general use of automobiles, buses, and trucks would enable the public to endure the hardships of a temporary suspension of railroad traffic, there would, in a comparatively short time, be real difficulty in obtaining food and other essentials, and there would be large industrial losses, accompanied by unemployment and the consequent suffering of the laboring classes. The seriousness of a possible paralysis of railroad transportation was brought home to the public consciousness by the attempted country-side railroad strike in 1894, that was broken by the prompt and decisive action of President Cleveland, and by the threatened strike of 1916 that was averted by the hasty enactment by Congress of the Adamson Law upon the earnest appeal of President Wilson. There was no justification for the attempted strike of 1894, and it is much to be regretted that Congress should have been forced to carry out the mandate of a particular group or interest, as it was in 1916, in order to cause that group to refrain from bringing a catastrophe upon the country.

The public regulation of railroad labor largely determines the working conditions and the wages of railway employees. Indeed, that is the main direct purpose of government regulation of

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railroad labor; and such regulation must necessarily have a large effect upon the expenditures of the railroads, upon their prosperity, and thus upon their ability to serve the public and to carry forward the technical development of railroad facilities. Railway wages comprised more than 63 per cent, in 1936, of total operating expenses, and 45.5 per cent of total operating revenues. It is thus evident that, in adopting a policy of government regulation of railroad labor, attention should be given to the relation of wages to the revenues and expenditures of the railroads as well as to the attainment of abstract ideals of employment and social standards.

Especially is it important, in fixing standards as to hours of labor and wages in the railroad service, to keep in mind the inevitable effect upon railroad operation, maintenance, and developing or maintaining, in the railroad service, standards much higher than those that prevail, and are permitted by the public, in other means of transportation and in industry generally. If the relation between railroad wages and working conditions and the wages and working conditions which the competitors of the railroads are allowed to maintain is disregarded, the effect will be to retard railroad development, to limit the scope of railroad operations, and to reduce the number of men actually employed by the railroads. Unless wisely carried out, government regulation may defeat its purpose of being helpful to labor and beneficial to the public by hampering or making impractical the successful competition of the railroads with other agencies of transportation and by compelling the railroads to employ fewer laborers than a different government policy would make possible.

### ORGANIZATION OF RAILROAD LABOR

At the present time, the employees of the railroads are more generally and efficiently organized than is any other large class or group of laborers. While railroad employees have membership in 40 different unions,<sup>1</sup> the number of "standard railways

<sup>1</sup> For a good brief discussion of railroad labor organization and of wages and working rules, consult *The American Transportation Problem* (1932), by H. G. Moulton and associates, Chap. ix.

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unions" is 21, and these 21 include three different kinds and groups of organizations.

One group is called the "big four" and includes the three "brotherhoods" of Locomotive Engineers, of Locomotive Firemen and Enginemen, and of Railroad Trainmen, and the "Order" of Railway Conductors of America. The entire membership of these four organizations, which in prosperous times numbered about 400,000 men, is employed by the railroads, and all railroad engineers, firemen, conductors, and trainmen that are eligible are members of the organization. The "big four" are of the nature of craft guilds. They do not affiliate with the American Federation of Labor, and usually, though not always, each organization acts individually in conducting negotiations with the employers of its members.

Another group of railroad labor unions includes those that are affiliated with the American Federation of Labor. There are 16 such unions of which the nine more important unions constitute the Railway Employees Department of the American Federation of Labor and are grouped in three sections; section one is composed of the Switchmen's Union; section two, of six shop workers' unions—blacksmiths, boiler makers, carmen, machinists, sheet-metal workers, and electrical workers; section three, of stationary firemen and oilers, and of maintenance-of-way employees. The Railway Employees Department of the Federation establishes system federations on different railroads. Where such a system federation has been chartered it represents the members of all the shop craft unions in negotiations with the employers "and no single craft can make a separate wage agreement without the consent of the president and executive council of the department."<sup>2</sup>

The third group of "standard unions" of which certain classes of railroad employees are members includes those craft organizations whose membership consists mainly of non-railroad laborers. Such organizations as the Sheet Metal Workers' International Association and the International Brotherhood of Electrical Workers include workmen from numerous industries or employ-

<sup>2</sup> Statement by Louis Lorwin in his *The American Federation of Labor*. The statement is quoted by H. G. Moulton, *op. cit.*, p. 184.

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ments. Their influence in shaping railway labor policy is of minor importance.

In addition to the "standard railway unions," which are national or international organizations, there are the many independent local or company unions, which, in the past, have played a relatively important rôle on some railroad systems and in some of the crafts, especially of the shopmen. Some railroads, notably the large Pennsylvania Railroad system, preferred to have negotiations concerning wages and working conditions conducted by committees consisting of equal numbers of company officials and of employees selected by the organizations formed by the employees. While this apparently produced results satisfactory to both the employees and the employers, the company union plan was, quite logically, opposed by the national or standard unions, and in the labor laws enacted by Congress in 1933 and 1934 the influence of the national unions has prevailed in legislation concerning not only railroad labor, but, to a less degree, in legislation regarding labor generally. The labor provisions of the Emergency Railroad Transportation Act of 1933 and the stipulations of the Railway Labor Act of 1934 are set forth in later parts of this chapter. The latter law seeks definitely to put an end to the company union in the railroad service.

The railway unions were among the earliest of labor organizations; they have had an interesting history, and have been especially successful in accomplishing the purposes for which they were established and for which they have been developed. The Brotherhood of Locomotive Engineers was established in 1863; five years later, the Order of Railway Conductors of America was organized; in 1873, the Brotherhood of Locomotive Firemen and Enginemen was formed; and, in 1888, the Brotherhood of Railroad Trainmen came into existence. The Order of Railroad Telegraphers was organized in 1886. The Brotherhood of Railway Carmen of America dates from 1890. The Brotherhood of Railway Trackmen started in 1891 as an educational and fraternal society which, in 1898, was enlarged in scope and became the Brotherhood of Maintenance of Way Employees. The Switchmen's Union of North America dates from 1897; and the other

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existing organizations of railway employees have been established since 1900.<sup>3</sup>

These organizations were formed to raise and to standardize the qualifications of their members, to enter into agreement with their employers as to wages, working conditions, seniority of appointment and promotion, and to establish and administer funds to provide accident relief and life insurance for their members.<sup>4</sup> These aims have been in large measure adhered to by the railway brotherhoods, the ideals and methods of the earlier organizations having largely influenced those established at a later date. The "big four," which were those first organized and which included in their membership the four groups of train operatives, engineers, firemen, conductors and trainmen, have been especially influential in working out, developing, and maintaining standards of service and of compensation therefor. With the exception of the Railroad Trainmen, these four organizations were started to provide accident relief and insurance for their members; but they all soon worked out, with the railroad companies, "schedules" or contracts covering wages, hours of labor, and working conditions. While the provision of relief and insurance for members has continued to be one of the activities of the several railroad labor organizations, they have given increasing emphasis to matters common to all labor unions, the formulation and enforcement of rules and regulations governing employment.

Prior to the World War only a minority of railroad employees were members of the brotherhoods and orders, but when the Government took over the operation of the railroads at the end of

<sup>3</sup> For the history of railway labor organizations up to 1900 and for an account of their organization, activities, and relief departments consult "Report on Railway Labor in the United States," by Professor Samuel McCune Lindsay, Reports of the United States Industrial Commission (1901), Vol. XVII, pp. 710-1172.

<sup>4</sup> The beneficial and insurance features of the earlier railroad labor organizations are described in a report on Brotherhood Relief and Insurance made by the author in 1896 to the United States Commissioner of Labor. It was published in the Bulletin of the Department of Labor, Vol. III, July, 1898. The author also prepared a report in 1895 on Railway Relief Departments (of the railroad companies) that was published in the Bulletin of the Department of Labor, No. 8, January, 1897.

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1917, all groups or classes of employees were encouraged to organize. The Director-General of Railroads established as a part of his general organization a Division of Labor and appointed as the head of the division the Chief of the Brotherhood of Railroad Firemen and Enginemen. When the Government took over the operation of the railroads, there were pending demands of two brotherhoods for increased wages. The increased cost of living and the higher wages being paid by the non-railroad industries caused railroad employees to insist upon an increase in pay; and the Director-General promptly appointed a Railroad Wage Commission, which, after a survey of wages, recommended wage increases for all railroad employees receiving less than \$250 per month. The Director-General carried out the recommendations with some larger increases than had been proposed for shop crafts and common labor; and the Director-General established for all kinds of railroad employment the basic eight-hour day which by the Adamson Act of Congress in 1916 had been fixed for train operatives.

As suggested by the Wage Commission, the Director-General appointed a Board of Railroad Wages and Working Conditions to investigate, and report to him upon, wages and wage policies. The Board could not fix wages. The Director-General also established a Railroad Adjustment Board for each of four different groups of employees. These boards were composed of an equal number of representatives of the employees and of the railroad employers. The railroads and the officers of the labor organizations agreed to submit to these boards controversies as to wage schedules and other working conditions that could not be adjusted by direct negotiations of employer and employees; and the bipartizan boards were successful in settling practically all of the thousands of disputes that came before them.

The phenomenal success of the adjustment boards was doubtless made possible during the first year of their functioning by the compromising spirit caused by a desire to do nothing to hamper the prosecution of the war; but during the year and more of government operation of the railroads following the Armistice the demands of labor for increased wages to offset the effect of higher prices caused a growing spirit of discontent



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to develop that was held in check only by the assurance that upon the resumption of private operation the wages of the employees would be given prompt consideration, and that the rates of the carriers would be so adjusted as to enable the carriers to pay increased wages.

The policy of the Railroad Administration during the 26 months of Government operation of the railroads greatly increased the percentage of employees who were members of the railway unions. Since the World War, about three-fourths of all employees have been union members. The men in the higher and more technical grades of service are practically all members; but the percentage is naturally lower among the clerical staff and the shop and track laborers where the pay received is less and the number of employees fluctuates seasonally and with varying business conditions. The events of 1932 to 1934 and the legislation since enacted have again strengthened the railway labor organizations and given them greater influence in determining wages and conditions of employment and in shaping legislation affecting them. The executives of the several brotherhoods and unions have formed an association with headquarters in Washington, D.C., and this Association of Railway Labor Executives speaks for all the railway unions in negotiations with the carriers as regards general wage scales. The Association also concerns itself watchfully and effectively with all congressional legislation affecting railroad labor. The provisions of the Emergency Railroad Transportation Act of June 16, 1933, of the Railway Labor Act of June 21, 1934, and of the Railroad Retirement and Pension Act of June 27, 1934 (which acts will be considered presently), are evidence of the success of the Railway Labor Executives' Association in promoting favorable legislation.

As will be noted in considering the Railway Labor Act of 1934, the position of the national unions as the representatives of all railroad laborers has been much strengthened by legislation directed against the company unions. That statute provides that "no carrier, its officers or agents . . . shall use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining"; and the statute further stipulates that the

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Adjustment Board created by the Act "shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations, national in scope, as have been organized in accordance with the provisions of section 2 of this Act." This does not prevent, and has not prevented, the employees of a railroad from having an organization or several organizations of their own with representatives on committees or boards composed of representatives of employees and employers for the conduct of negotiations regarding working conditions and other matters concerning which differences may arise. The representatives selected by the employees for such negotiations need not be persons in the employ of the carrier, but where the so-called "company unions" have been functioning to the satisfaction of the employees, they will presumably continue to select their own members, instead of officials of national organizations, to represent them in negotiating with their employer. Moreover, while the provisions of the Act of 1934 are intended to prevent the railroad company from fostering and maintaining company unions as against country-wide unions the statute provided in Section 3 of the law that:

Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

The establishment of a board of adjustment for a single railroad system may be by an agreement between the railroad company and the appropriate official of a national union of which the railroad employees are members. On the Pennsylvania Railroad lines there were in May, 1935, eight system boards of adjustment.<sup>5</sup> The eight boards represented about 100,000 men and 85 per cent of the employees of the system. The seventh system

<sup>5</sup> *The Railway Age*, Vol. 98, pp. 544, 832.

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board established was one representing the 3,000 Pennsylvania Railroad signalmen, signal maintainers, and helpers, and was created by an agreement entered into by the Chief of the Brotherhood of Railroad Signalmen of America and by four general managers of the railroad system. The eighth system board of adjustment was established by agreement between the Pennsylvania Railroad and the representatives of the dining-car stewards on its lines.

The general scales of wages of different classes of railroad employees, as will be noted later, are standardized, for the most part, on a country-wide basis and are fixed by agreements between the carriers and the national labor organizations. Changes in such general agreements are now usually effected by negotiations of the national organizations with railroad companies as a whole or with the railroad companies in a section of the country. If negotiations are unavailing, the government agencies of mediation and arbitration are called into action. In addition to the country-wide agreements that attract general attention, there are many more agreements between a single railroad system and the individual unions of which the railroad company's employees are members. This is illustrated by the reference made above to the agreements that the Pennsylvania Railroad system has with its several classes of employees. However, after agreements as to wages and working conditions—whether the agreements are country-wide or are between a single railroad system and its employees—have been reached they have to be applied, and their application and interpretation may give rise to differences of opinion, to disputes, and grievances. Such disputes are now settled by a National Adjustment Board composed of an equal number of representatives of employers and of employees and subdivided in four divisions and into regional boards as provided for by the Railway Labor Act of 1934, which statute stipulates that:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of the approval of this Act, shall be handled in the usual manner up to and

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including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts, and all supporting data bearing upon the disputes.

The decisions made by the Adjustment Board after hearing both parties to a controversy are "binding upon both parties to the dispute . . . except insofar as they [the decisions] shall contain a money award," which are enforceable only against the carriers.

The evident purpose and result of recent congressional legislation has been to make the national organizations the chief and the controlling representatives of railway labor in negotiations with the carriers for the determination of wages and the adjustment of disputes. The review given in a later division of this chapter of the railway labor laws passed by Congress from 1888 to the present will indicate the steps by which present policy has been reached.

### MAIN FEATURES OF RAILROAD WAGES AND WORKING RULES

The present systems of wages prevailing in the several classes of railway service, and the units of service for which wage payments are made, are the result of a long period of evolution. For most employees, wages are upon an hourly basis. Less than one-tenth are paid wages based upon a day's service, the daily basis prevailing mainly for employees performing professional and clerical services, for station and yard masters, and some classes of foremen. Before the shop employees were generally organized and were members of the national unions, the wages for a considerable percentage of the shopmen were upon a piece-work basis; but, while there are some railroads that still maintain the piece-work plan of payment for shopmen, the total number of employees so paid is said to be but 2 per cent of railroad workers.<sup>6</sup>

Those in the train operative services, i. e., engineers, firemen,

<sup>6</sup> H. G. Moulton, *op. cit.*, pp. 186-187. Chap. ix of this volume contains a good discussion of Railroad Wages and Operating Costs.

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conductors, and trainmen, have wages fixed upon a dual basis. In the freight service, eight hours or a run of 100 miles constitutes a standard day. If the train makes the run in less than eight hours the employees receive a day's wage; if more than eight hours are required to make the run they receive time-and-a-half pay for the overtime. If the train makes a run of more than 100 miles in eight hours the operators receive additional pay equal to as many one-hundredths of the standard day's wage as the number of miles run exceeds 100. If the run of more than 100 miles requires more than eight hours the wages include both the payment based upon the mileage and also time-and-a-half pay for the time over eight hours. For instance, if a freight-train conductor's standard day's wage were \$6.00 and his train made a run of 125 miles in 10 hours he would receive  $125/100$  of \$6.00 plus  $1\frac{1}{2} \times \frac{6}{100}$  of a dollar or \$8.625.

In the passenger-train service the engineers and firemen are paid a standard wage for a run of 100 miles or for five hours of service. If the run is made in less than five hours, a full day's wage is paid; if more than five hours are consumed in making the run, overtime is paid for at the standard rate. Pro-rata rates, not time-and-a-half rates, are paid for overtime. The bases of the pay of conductors and trainmen on through passenger trains are a run of 150 miles or seven and a half hours. As in the case of the passenger-train engineers and firemen the standard hourly unit of performance is a run of 20 miles, and overtime is paid for at the standard hourly rate.

The dual basis of wages for train operatives originated many years ago, its purpose being to give the crews an incentive to speed up trains and thus to make it possible to operate more trains with a given number of locomotives and to move more traffic over a given roadway. The system is not perfect. It allows some employees, for relatively short hours of service, to receive larger pay than other employees of the same class obtain for more hours of labor.

The working rules controlling the conditions under which men labor are scarcely less important than the rates of wages. Indeed the working conditions affect the earning capacity as well as the safety, health, and esprit de corps of the labor force. Naturally,

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working rules have continuously been the subject of the direct negotiations of railroad labor with its employing company and of the several national unions with individual railroad systems and with the railroads in different sections and in the country as a whole.

Each of the "big-four" brotherhoods—engineers, firemen, conductors, and trainmen—had, by negotiations with the railroads, worked out not only wage "schedules" but working rules long before the World War, but such other railway labor unions as had been organized up to that time had accomplished less in formulating working rules and securing their adoption by the railroads. Moreover, only a minority of railroad employees were then organized. This situation was changed during the period of government operation of the railroads. The Director-General of Railroads and the Director of the Division of Labor of the Railroad Administration encouraged each class of railroad labor to form a national organization. Working rules, as well as wages, were worked out on a national basis with and for each labor class or craft. The working rules thus standardized were established by national agreements and made to apply to all carriers subject to the Railroad Administration. This was most satisfactory to the railroad employees and to their organizations, and their leaders sought to have the working rules of the several classes continued in full force after the return of the railroads to their owners for operation.

The Transportation Act of 1920, which brought the government operation of the railroads to an end, created a Railroad Labor Board for the adjustment of disputes between railway employers and employees as to wages and working rules. The Board gave consideration first to wages and granted the employees an increase in pay for which they had been making demands during the last year of government operation. In taking action in 1920, and also in authorizing some decrease in wages in 1921, the Railroad Labor Board dealt with all railroad employees collectively, and the decisions reached by the Board were applicable to all railroads. The Labor Board allowed the working rules, as they had been established for the several classes of railroad labor by national agreements during the period of gov-

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ernment operation, to remain unchanged until, by a decision effective July 1, 1921, the Board held that the national agreements should be terminated on that date.

When the Railroad Labor Board announced that the national agreements as to working rules were not to be in force after July 1, 1921, the Board called upon the carriers and their several classes of employees to have local conferences and to inform the Board by July 1, 1921, whether agreements had been reached. If agreement were not reached by a carrier and its employees, the Board would promulgate rules. To guide the railroads and their employees in working out agreements the Board formulated a set of 16 principles which were, in effect, a code with which the provisions of the agreements must conform.

The Railroad Labor Board, in bringing the national agreements to an end and in calling upon the several carriers and different classes of employees to agree upon rules governing working conditions, was relying upon the labor provisions of the Transportation Act of 1920 which required each carrier and its employees by direct negotiation with each other to adjust disputes, if possible. The statute provided that, in case a dispute between the officials of a carrier and its employees as to working rules and conditions could not be settled by direct negotiations, the dispute might be brought before an adjustment board; and the law contemplated the establishment, by voluntary action of the carriers and the organizations of the employees, of regional or national adjustment boards composed of an equal number of carrier representatives and employee representatives. The purpose of the statute was to have disputes or disagreements as to working rules reach the national Railroad Labor Board only upon appeal from a decision of a regional or national adjustment board; but the statute did not work out in practice as had been planned. The adjustment boards were not established. What the railway unions wanted was the continuance of the national agreements that they had secured during the favorable period of government operation, while the carriers did not favor the establishment of adjustment boards composed only of representatives of the employees and the carriers. The railroads wanted tripartite boards, which, with representatives of the public as

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members, would become, in effect, boards of arbitration rather than boards of mediation. The result of this deadlock was that all disputes as to working conditions and rules that were not settled by direct negotiation of the carrier and its employees were, or might be, brought directly to the Railroad Labor Board, which was burdened with questions that the framers of the statute expected would be settled by conferences of the interested parties.

The carriers were insistent upon the discontinuance of the national agreements and of working rules embodied in the agreements. The relation of the carriers and the several classes and organizations of train-service employees had been worked out before the World War and was not a matter of controversy; but that was not true of the relation of the carriers to other crafts and classes of employees—a relation that had been established by the United States Railroad Administration through the national agreements. Five of those agreements, those affecting the shop crafts, maintenance-of-way employees, clerks, firemen and signalmen, had been promulgated between October, 1919, and February, 1920, and three of the five were made after the President had issued his proclamation stating that the railroads were to be returned to their owners for operation. The carriers maintained that working rules should not be national in scope, but should take into account differences in local conditions; and the carriers also regarded the working rules adopted during government operation to be unduly burdensome. The rules not only fixed the length of the working day, the time when work was to start and when it was to stop, and payment for overtime; but they also, in some cases, provided for the payment for time not worked, and they prohibited piece-work, restricted apprenticeship, and so classified work by crafts as to make it necessary in many cases for several men to do different parts of a task that might be performed at less cost by one man.

Following the termination of the national agreements, it became the general practice of the employees to negotiate with individual carriers. On some railroad systems, the non-train-service employees had their company or system organizations, which represented them in negotiations with their employer. For the most part, however, the negotiations as to working rules



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were carried on by the national unions with the railroad companies, sometimes with individual railroads, sometimes with territorial groups of carriers. After the Railroad Labor Board had reduced wages somewhat by its decisions of 1921 and 1922 and had refused to continue in force the national agreements as to working rules, the leaders of the national railway unions sought to avoid bringing their problems to the Labor Board. Moreover, the carriers became dissatisfied with the policy pursued by the Board; and the carriers and labor-union leaders decided that it would be better to return to the practice that had prevailed before the World War of emphasizing mediation in settling controversies. Accordingly, the carriers and the leaders of the railway unions agreed upon and drafted a bill that was adopted by Congress in 1926. This Act abolished the Railroad Labor Board and created a Board of Mediation. The Railroad Labor Act of 1926, as amended and supplemented by the Railroad Labor Act of 1934, is now in force.

While business was prosperous, as it was during most of the decade ending with 1930, wages tended to rise and working conditions to improve, and the railway employees through their system organizations and their national unions were able to adjust wages and working rules satisfactorily, and usually without much difficulty, by negotiations with individual carriers. The engine and train-service brotherhoods favored negotiations with regional groups of carriers. However, when it became evident that the business depression which had begun at the end of 1929 would be prolonged, that the railroads would necessarily largely decrease the number of their employees, and that there would be difficulty in maintaining the general wage scales, the 21 standard railroad unions adopted a policy of greater coöperation. In the wage negotiations of 1931 and 1932, when a temporary general reduction of 10 per cent in railroad wages was adopted, and again in the negotiations of 1933 and 1934 which resulted in the restoration of the 1932 wage scales, the employees and their 21 unions were represented by the Railway Labor Executives Association; and, as has been stated above, that association was influential with Congress in connection with the legislation concerning railroad labor adopted in 1933 and 1934.

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## FEDERAL LEGISLATION CONCERNING RAILROAD LABOR:

1888 TO 1926

During a period of nearly half a century railroad-labor legislation has, from time to time, received the attention of Congress. The first of the seven general statutes enacted during that period was the Arbitration Act of October 1, 1888, which provided for the voluntary arbitration of disputes between the carriers and their employees. There was no special machinery set up to carry out the Act; the interested parties were to act upon their own initiative, and a decision reached by arbitration was not enforceable by legal proceedings. The dispute was arbitrated by invoking the provisions of this act. The law authorized the President of the United States to appoint a temporary commission to investigate and report upon a dispute, and such an investigating commission was appointed by President Cleveland, in 1894, to report upon the Pullman Strike; but the commission was not appointed until after the strike had been brought to an end by the exercise of Federal authority, and the only value that the commission's report had was to indicate the need of further legislation.

June 1, 1898, Congress repealed the Arbitration Act of 1888, and substituted therefor the Erdman Act, which was limited to the settlement of disputes involving employees connected with the operation of trains, but which provided both for mediation and for arbitration and placed the administration of the law in charge of two government officials, the Chairman of the Interstate Commerce Commission and the Commissioner of Labor. If a dispute arose that the interested parties could not settle by negotiation, either party to the dispute could invite the government officials to attempt to settle the controversy by the process of mediation and conciliation; and if a settlement was not reached by that process, it was the duty of the Chairman of the Interstate Commerce Commission and the Commissioner of Labor to try to get the disputants to agree to arbitration. If the parties agreed to arbitrate, their agreement stated the questions to be arbitrated; each side selected an arbitrator, and those two were to choose a third, and impartial, arbitrator, and, if they

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could not agree upon the third member of the board, he was to be selected by the Chairman of the Interstate Commerce Commission and the Commissioner of Labor. The award of the arbitrators was enforceable through equity proceedings in the Federal courts, the award being binding upon the parties concerned for a minimum period of one year, unless set aside by an order of the court. Moreover, when the arbitration of a dispute was agreed upon, strikes and lockouts were prohibited for the period of the arbitration proceedings and for three months after the decision or award made by the board of arbitrators. From its enactment in 1898 to 1912, the Erdman Act was effective in bringing about the settlement of controversies. Of the 60 disputes settled about three-fourths were adjusted by mediation and one-fourth by arbitration.

The first agreement to arbitrate a dispute was made in 1906, and was entered into by the Southern Pacific Railroad and the Order of Railroad Telegraphers. The main questions involved were the wages paid and the allowance of one day off each week for telegraphers on the railroad company's lines east of El Paso, Texas. The arbitrators were selected, but before the Board started to hear the case, the Commissioner of Labor succeeded in bringing about a settlement of the dispute and arbitration was not necessary. The same questions were involved in a dispute between the Southern Pacific and its telegraphers on the company's lines from El Paso to the Pacific, north to Portland, Oregon, and east to Salt Lake City. The company and the Order of Railroad Telegraphers agreed to arbitration under the terms of the Erdman Act. The railroad company selected for its arbitrator the superintendent who employed the men, the Order of Telegraphers chose as their arbitrator the Grand Chief of the Order. These two men failed to agree upon the third, and impartial, arbitrator; and, as it happened, the Chairman of the Interstate Commerce Commission and the Commissioner of Labor selected the author of the present volume.

The experience which the author had in this first railroad arbitration proceeding, which was held in San Francisco in March and April, 1907, was most instructive to him, and it revealed the limitations of arbitration as provided for by the Erdman Act.

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Throughout the taking of testimony, which lasted three weeks, the author, as the representative of the public, had to decide as between the other two members of the board what testimony should be admitted to the record. When the attorneys for the employees wished to present evidence to which the attorneys for the railroad company raised objections, the employees' attorneys always had the support of the employees' representative on the board. The railroad member of the board was quite certain to support the objectors; and the impartial member of the board had to decide as between the other members of the board. Similarly the attorneys for the railroad company had the support of the railroad member of the board and the opposition of the telegraphers' member. Likewise, the decision reached by the board at the close of the hearings reflected the views of the impartial umpire who, as is customary in such situations, formulated a compromise decision which he persuaded the other two members of the board to accept. Thus it was one arbitrator rather than three that decided what testimony should be admitted and considered, and what decision ought to be reached. If the two able members of the board who represented the employees and their employer had been at the bar advising their attorneys, and had the board been composed of three impartial arbitrators interested only in reaching a just, equitable, and practicable adjustment of the questions at issue, the facts admitted to the record for consideration and the decision reached would have been the objective judgment of three men instead of one. Later experience under the Erdman Act caused both the carriers and the railroad unions to object to submitting important questions to the decision of one impartial umpire, and this was one cause of the adoption of the Newlands Act of 1913.

The cost of living rose as business revived following the depression that ended in 1898, and by 1910 the train operatives, who were the best organized of the railroad employees, began pressing for increased wages. For about ten years the disputes had been successfully adjusted by the mediators provided by the Erdman Act; but, in 1912, the railroad engineers in the territory of the eastern carriers, through the Brotherhood of Locomotive Engineers, made demands that the carriers would not

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grant, and the dispute could not be settled by mediation. The carriers would not agree to arbitration of a dispute involving 50 railroads and 30,000 men by a board of three having but one neutral member. A special board of seven men, five of them neutral, was agreed to. The board granted an increase in wages, but the meaning of the terms of its decision led to numerous disputes and the results were not satisfactory. The other groups of train operatives in eastern territory, the firemen, conductors, and trainmen, followed the engineers in demanding higher wages. The firemen and their employees settled their dispute by arbitration under the Erdman Act, but the conductors and trainmen and the carriers became deadlocked. They objected to arbitration under the Erdman Act. The President sought unsuccessfully to settle the dispute. The parties, however, agreed to arbitrate if the proposed legislation were enacted, and this was the occasion, if not the entire cause, of the adoption by Congress of the Newlands Act of July 15, 1913, to take the place of the Erdman Act of 1898.

The Newlands Act established a permanent Commissioner of Mediation and Conciliation and a board consisting of the Commissioner and two other government officials to be selected by the President. The board could act upon its own motion, without waiting for an invitation, in seeking to bring about the settlement of disputes by mediation. When a dispute had been settled by mediation or arbitration, either party could call upon the Board to interpret the meaning or to define the application of the terms of the settlement. When the disputants agreed to arbitrate, the Board of Arbitration might consist of three arbitrators as under the Erdman Act or might include six members, two selected by each side and two representing the public. The arbitration board was not required to reach a decision in 30 days, but its decision was not enforceable by court procedure, and the Newlands Act omitted the provisions of the preceding law prohibiting men from striking and the company from discharging men during the period of arbitration and for three months thereafter.

The Newlands Act, with the exception of its failure to adjust the controversy settled by the Adamson Act in 1916, functioned

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successfully during the four and one half years that intervened between its passage and the beginning of government operation of the railroads. The threatened strike of the conductors and trainmen in the eastern territory that was pending in 1913 was settled by arbitration; and during 1914 and 1915 the wage controversies between the train operatives and the carriers west of the Mississippi were arbitrated. There were in all 77 disputes settled by mediation and 22 settled by arbitration while the Newlands Act was in force.

The success of the "big-four" organization of train operatives in securing wage increases during 1913, 1914, and 1915, and the prosperity of the carriers, especially in 1916, led to a demand, in the summer of that year, for a standard eight-hour working day for all freight-train operatives and pay-and-a-half for overtime. The carriers maintained that the demand could not be granted. The union leaders then had a vote of their members taken and 90 per cent of the men voted for a country-wide strike. Mediation by the Board of Mediation was unavailing, and then, in August, President Wilson sought to bring about an adjustment of the dispute. His proposal of arbitration was rejected by the union leaders. The President then sought to induce the carriers to adopt an eight-hour day, the men to accept regular pay for overtime until a commission could make an investigation of the effect of the eight-hour day upon the railroad's net revenues. This proposal was acceptable to the union officials, but not to the railroad executives, and on August 28th, the labor leaders called a strike to start on Labor Day, September 4th. To meet the emergency President Wilson addressed Congress, August 29th, urging legislation, and the Adamson Act passed the House of Representatives September 1st and the Senate September 2nd. The Act thus adopted provided that after January 1, 1917, there should be a standard eight-hour day for train operatives, with certain exceptions, and that the President should appoint a commission of three men to report to the President and Congress upon the operation of the eight-hour day. Pending the investigation of the commission and for 30 days after its report, the wages for an eight-hour day should not be lower than the standard daily wages being paid when the Adamson Law was en-

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acted. As the railroad companies considered the law to be unconstitutional, they did not establish the eight-hour day January 1, 1917, as required by the Act, but brought a test case in a United States Court to determine the validity of the statute. Early in March, while the case was pending in the Supreme Court, the labor leaders became fearful that the prospective entry of the United States into war with Germany might prevent the eight-hour day from going into effect; and, becoming impatient because of the delay of the Supreme Court in reaching a decision, a second nation-wide strike was ordered to take effect March 17th. President Wilson sought to head off the strike by having the controversy submitted to a committee of the Council of National Defense. This was done; the labor leaders postponed the date of the strike to March 19th, and on that day the railroads agreed to put the Adamson Law into effect (as of January 1, 1917) without waiting for the decision of the Court. Later that same day, however, the Court handed down its opinion. By a vote of five to four the Court upheld the Adamson Law as an act that Congress had power to enact to meet a national emergency that could not be met in any other way. Thus the eight-hour day became the standard for train operatives. Nineteen days later, war was declared and at the end of the year the Government took over the operation of the railroads. Before the period of government operation ended, the eight-hour day had become the standard not only for train operatives, but for all railroad employees. Pay-and-a-half for overtime applies to some classes of employees but not to all. As has been explained, wages paid for services depend in part upon working rules. Such rules were more favorable to several crafts during government operation than they were after the revision of the working rules in 1921.

Reference has been made to the labor provisions of the Transportation Act of 1920, which provided for the return of the railroads to their owners for operation under more comprehensive government regulation than had prevailed before the World War. The foregoing discussion of the adjustment of railroad wages and working rules, following the termination of government operation of the railroads, indicated that the Act of 1920 did

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not work out successfully. The employees resented being compelled to accept reductions in wages and to give up the country-wide working rules that had been secured during government operation. The employees wanted national adjustment boards composed only of an equal number of representatives of employees and employers; while the carriers objected to national adjustment boards, preferring system boards. The result was that the voluntary adjustment boards, that were authorized by the Act of 1920 and that were to settle disputes as to grievances, rules, and working conditions, were not established; and the tripartite Railroad Labor Board, that was to have dealt only with the adjustment of controversies as to wages and to have considered disputes as to working rules only upon appeal from the decision of an adjustment board, was the sole tribunal for the settlement of the manifold disputes, many of minor consequence, concerning grievances and working rules. Moreover, the Board could not enforce its decisions and rulings, and the effect of this was shown by the controversy between the Pennsylvania Railroad Company and the Board. The Board decided that the shopmen employed by the railroad company, who were affiliated with the American Federation of Labor, could select non-employees of the company to represent them on an adjustment board composed of representatives of the employees and the company, and the Railroad Labor Board stated how the labor representatives should be selected. The company contended in the Federal courts that the Board could not promulgate rules to be followed in the election. The Supreme Court decided<sup>7</sup> that the Board could take the action it had taken, but that under the Act of 1920 there was "no restraint upon them [the carriers] to do what the Board decides they should do except the moral constraint . . . of publication of its decision."

The labor provisions of the Transportation Act of 1920 having proven ineffectual, representatives of the railroad labor organizations and of the railroad executives in 1926 agreed upon the draft of a law to take the place of the unworkable labor sections of the

<sup>7</sup> *Pennsylvania Railroad Company v. U.S. Railroad Labor Board*, 261 U.S. 72.



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Act of 1920. The bill thus drafted was promptly adopted by Congress and became the Railway Labor Act, approved May 20, 1926. This act was a reestablishment of mediation as the main method of adjusting railroad labor disputes, and was thus a return to the principle underlying the Newlands Act of 1913. The Act of 1926 stipulated that disputes should, if possible, be settled by conference of the interested parties; it provided for the establishment of boards of adjustment by the voluntary action of any carrier and its employees or of a group of carriers and their employees, these adjustment boards being given jurisdiction over employment grievances and over the meaning and application of existing agreements but not over rates of pay or working rules; it created a board of mediation of five men appointed by the President with power to act on its own initiative to attempt to settle by mediation disputes as to wages or working conditions and as to controversies not settled by adjustment boards, and, in case of the failure of mediation, to persuade the disputants to submit their controversy to a board of arbitration. The Act prescribed the method of selecting the arbitration board, and the procedure to be followed by the board, and provided that the decision reached by the board should be filed with a district court of the United States and be binding upon the parties concerned unless the court or the circuit court, upon appeal, should upon strictly legal grounds, suspend the enforcement of the decision; and finally, the Act provided that in case the Board of Mediation was unable to bring about a settlement of a dispute by mediation or by persuading the parties to agree to arbitrate and if the controversy threatened to interrupt interstate commerce seriously, the Board should notify the President who was authorized by the law to appoint an emergency board to make an investigation and to report to him within 30 days, the parties in dispute being prohibited by the law to make any change in the conditions out of which the controversy arose, except by mutual agreement, during this 30-day period and for 30 days after the emergency board had rendered its decision. The decision reached by the emergency board was not enforceable by legal procedure; but dependence was placed upon the effect of preventing a strike or a lockout for 60 days and upon the fact that the general public sup-

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port that would be given the findings of an impartial tribunal would cause the parties in dispute to accept the decision of that tribunal.

The Act of 1926 was ably administered and was effective in bringing about the peaceful settlement of railway labor disputes. With two minor and unimportant exceptions strikes were avoided, although there were 29 affirmative strike ballots taken from 1926 to 1933. During this period the Board of Mediation settled more than 500 controversies by mediation and brought about more than 200 agreements to arbitrate.<sup>8</sup> In five disputes that threatened to interrupt interstate commerce, the Board of Mediation was not able to effect a settlement and the President was notified. The five emergency boards appointed by the President to investigate and report upon these cases rendered decisions that prevented the occurrence of strikes. Mediation, arbitration, and the adjudication of disputes by impartial public tribunals with the backing of public sentiment proved to be practicable and successful means of adjusting the relations of railroad employers and employees.

### FEDERAL RAILROAD LABOR LEGISLATION FROM 1933 TO 1937

In discussing the subjects considered in the foregoing chapters of this volume, numerous references have been made to the Emergency Railroad Transportation Act of 1933 and to the activities of the Coördinator of Transportation and his staff in carrying out the provisions of that statute that were in effect for three years from June 16, 1933. A discussion of government regulation of railroad labor would not be complete without a brief consideration of the labor provisions embodied in Section 7 of the law. These provisions were not a part of the original bill that became the Act of Congress. The man who became the Coördinator of Transportation was the originator and author of the bill, and as he states in the report which he made as Coördinator in January, 1935: <sup>9</sup> "As first proposed, the Emergency Railroad Transportation Act, 1933, had a comparatively simple purpose. The thought was that the railroads were wasting money by undue competition with

<sup>8</sup> H. G. Moulton, *op. cit.*, p. 197.

<sup>9</sup> Report of the Federal Coördinator of Transportation on Transportation Legislation, House Document No. 89, 74th Congress, 1st Session, p. 32.

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each other and by inability to get together for the common good. They were enjoined to coöperate in avoiding waste, and to further this end a coördinator was appointed with power to require action when necessary."

The bill provided, among other things, for three regional committees of carriers to coöperate with the Coördinator in carrying out the purposes of the Act, and while the bill was under consideration in Congress the Railway Labor Executives Association secured the inclusion in the bill of what became Section 7 of the law, the first paragraph of which made provision for "a labor committee for each regional group of carriers," the members of these committees to be selected by the national railroad labor organizations. The Coördinator was required "to give reasonable notice to, and to confer with, the appropriate regional labor committee . . . prior to taking any action or issuing any order affecting the interest of the employees." This did much to restore to the national railroad labor unions the strategic position, as regards the determination of the government policy concerning railroad labor, that they occupied at the close of the period of government operation of the railroads. This position of the national unions was further fortified by the legislation of 1934, to which reference will be made presently.

It was, however, the second paragraph of Section 7 of the Emergency Railroad Transportation Act of 1933 that was, at least temporarily, of most significance for railroad labor. This paragraph provided that

The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than five per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

Inasmuch as the economies in railroad operation, by a reduction in the duplication of services, by lessening competitive waste

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through greater coöperation of the carriers in line and terminal services, in the joint use of terminal facilities, and by other co-operative measures, would or might temporarily reduce the number of employees required, the labor provisions of the Emergency Railroad Transportation Act, as the Coördinator states,<sup>10</sup> "prevented much actual accomplishment in the elimination of waste." The Emergency Railroad Transportation Act of 1933 became a law when the problem of unemployment in the railroad service and in industry had already become a serious one, and it was but natural that the leaders of the railway employees should have sought to prevent the Act from increasing the number of men out of work. Two considerations, however, to which weight should have been given, were overlooked. The general aim of the emergency law was to assist the railroads. By reducing their expenses they were to be enabled to get more traffic, and thus to need more employees as their business increased and they became more prosperous. Whether the effect of the Act of 1933, had it operated as its framers expected, would have been both to decrease expenses and to build up traffic, cannot now be determined; but it seems quite clear that the long-run interests of railroad employees were not furthered by including in the Act provisions that foredoomed the law to failure. Indeed, in 1936, the railroad labor leaders decided that they did not desire to have Congress continue the labor provisions of the Act in effect after June 16th, of that year.

This decision was made after an agreement was reached between representatives of the Association of American Railroads and the Railway Labor Executives' Association, May 21, 1936, providing for compensation to railroad employees displaced or adversely affected by railroad consolidations made to effect economies. Under this agreement, which is to be in force for five years from June 16, 1936, the interested employees are to be given 90 days' notice of a contemplated coördination of facilities and the employee who is displaced is to be entitled to a "coördination allowance" equal to 60 per cent of the wages he has been receiving, the allowance to be paid for periods ranging from six months for those who have been in service one year and less than two years up to 60 months

<sup>10</sup> Report on The Regulation of Railroads, January, 1934. Senate Document, No. 119, 73rd Congress, 2nd Session, p. 31.

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for those who have been employed for 15 years or more. The displaced employee may, if he prefers, take a lump-sum compensation ranging with length of service from his regular salary for three months up to 12 months. Employees who are obliged to change their place of residence as a result of the consolidation of railroad facilities are to be compensated for the expenses incurred in making the change.<sup>11</sup>

Three other paragraphs of Section 7 of the Act of 1933 contained provisions that do not require discussion. They gave the Coördinator authority to establish regional boards of adjustment (a provision that was rendered unimportant by the Railway Labor Act of 1934), and authority to require carriers to compensate laborers for losses incurred "by reason of transfers of work from one locality to another in carrying out the purposes of this title"; and the law stipulated that "carriers, whether under control of a judge, trustee, receiver, or private management" must comply with the provisions of the Railway Labor Act (of 1926) and with those of Section 77 of the Bankruptcy Act of March 3, 1933.

The Railway Labor Act approved June 21, 1934, amends and supplements the Railway Labor Act of 1926. The general purposes of the Act of 1934 are stated, in Section 2, to be: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation, or application of agreements covering rates of pay, rules or working conditions.

The Act is especially intended to strengthen and make more effective the method and machinery for the adjustment of disputes "arising out of grievances or out of the interpretation or

<sup>11</sup> The provisions of this agreement are stated and discussed in the *Railway Age*, May 30, 1936, Vol. 100, pp. 885-887.

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application of agreements concerning rates of pay, rules or working conditions." The Act of 1926 had provided successfully for mediation and voluntary arbitration, but by leaving the establishment of boards of adjustment to the voluntary action of carriers and employees and by not creating by statute a national board with definite authority to act upon and decide disputes as to grievances and the interpretation of agreements as to wages and working rules, there had not been adequate provision made for the adjustment of the many misunderstandings and controversies that inevitably arise in the relations of employers and employees. In general, the Act of 1934 provides for the settlement of railroad labor disputes by the National Railroad Adjustment Board with divisions which are similar to the railroad adjustment boards that were established by the United States Railroad Administration and which the railroad labor leaders sought unsuccessfully to have perpetuated when the Government returned the railroads to their owners for operation.

The National Railroad Adjustment Board created by the Act, as has been stated, is composed of 36 members, 18 selected by the carriers and 18 "by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act." That section of the law assures to employees the right to join the labor organizations of their choice and the right of collective bargaining; and the law also provides that neither carriers nor employees "shall in any way interfere with or coerce the other in the choice of representatives." The statute not only places with the national unions the choice of the representatives of the employees who are to serve on the National Railroad Adjustment Board, but it also seeks to do away with the "company unions" as agencies of collective bargaining of employees with employers by prohibiting carriers from using their funds to maintain, to assist, or to contribute to any labor organization, labor representative, or other agency of collective bargaining. The Railway Labor Act of 1934, as did the Act of 1926, makes it the duty of the carriers and their employees, by every reasonable effort, to "make and maintain agreements concerning rates of pay, rules and working conditions," and, if possible, to settle disputes "in conference between representatives

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designated and authorized so to confer, respectively, by the carrier or the carriers and by the employees thereof interested in the dispute." The representatives selected by the employees may be employees of the carrier, but may be, and presumably will be, officials of the national unions. The position formerly held by the organizations of the employees of a single railroad system—the so-called company unions—as agencies by which employees selected men for membership of the joint conference committees, or boards of employee and carrier representatives, and that considered grievances and working rules, is being taken by such boards of adjustment as those that have been established upon the Pennsylvania Railroad system by agreements between the company and the officials of the national unions of which the employees are members.<sup>12</sup>

The 36 members of the National Railroad Adjustment Board are allocated to four "divisions," each of which is practically autonomous, as their "proceedings shall be independent of one another." The four divisions as constituted by the statute are as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be elected by the carriers and five by the national labor organizations of employees.

<sup>12</sup> *Supra*, p. 182.

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Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

The procedure prescribed by the statute is that in case a grievance or dispute growing "out of the interpretation or application of agreements concerning rates of pay, rules, or working agreements" is not adjusted by conference of the interested parties either party or both parties may file a petition with the appropriate division of the Adjustment Board, the petition being accompanied with a full statement of the facts and the supporting data. A hearing will be held by the division, or by members designated by the division, or by a regional adjustment board that the division may have established temporarily to act in its stead. The division, subdivision, or regional board that conducts the hearings may make findings upon disputes, "provided, however, that final awards as to any such dispute must be made by the entire division." If a division cannot agree upon an award the members are to select a neutral person to act as referee; and if the division cannot agree upon a referee, he shall be selected by the Mediation Board. "The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." A majority of the members of a division may make an award, and if a dispute arises as to the meaning of the award either interested party may call upon the Board to interpret the award. If a carrier does not comply with an order contained in a decision of the Adjustment Board, suit may be brought by an interested party in a United States District Court for an order to compel obedience. The statute does not provide for action against a labor organization that does not comply with an order of a division of the Adjustment Board. As the unions are not incorporated they cannot be sued, and presumably an order running against a union could not be enforced by action in the courts.

The statute of 1934 provides that the several divisions of the



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Adjustment Board shall maintain headquarters in Chicago, Illinois, and shall make an annual report of its activities to the Mediation Board. The Railway Labor Act of 1926 provided for a Board of Mediation of five members; but the 1934 Act substituted for that body a Mediation Board of three men, appointed, as their predecessors had been, by the President with the advice and consent of the Senate. The services of the Mediation Board may be invoked by the parties or either party in case of "(a) a dispute concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference," and "(b) any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." The statute also provides that, "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time," and if a settlement of a dispute by mediation is impossible the Board is to endeavor "to induce the parties to submit their controversy to arbitration." The rules governing the selection of the members of a Board of Arbitration and the procedure to be followed in arbitration are those provided by the Act of 1926.

It was the manifest purpose of Congress in adopting the Railway Labor Act of 1934 not only to provide an agency for the authoritative adjustment of grievances and of disputes as to the meaning and application of agreements concerning rates of pay and working rules, but also to enable the Mediation Board to do more than assist in settling disputes. The Board was to be the means of promoting the stabilization of the relations of railway employees and their employers. To enable the Board to render this constructive service, the statute provided that:

Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April, 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules or working conditions, or in those rates of pay, rules

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and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

The practical test of the wisdom and success of the Railway Labor Act of 1934<sup>13</sup> will come when and as the railroads work out of the period of business depression, as expanding traffic makes necessary an increase in employees, and as larger revenues make possible larger expenditures for maintenance of way and structures and for betterment of equipment and other facilities. Two agreements increasing wages were made in 1937 by the carriers and the unions with the coöperation of the National Mediation Board. The 14 non-operative groups of employees, were granted an increase, effective August 1st, of 5 cents per hour in their basic wages; and, effective October 1st, all engine, train, and yard-service employees secured a wage increase of 44 cents per day. Whether the carriers will be able to pay the increased wages without reducing the number of men employed will depend upon the as yet uncertain rate of expansion in railroad traffic and earnings.

The leaders of railway labor during the depression devoted their efforts mainly to the accomplishment of the impossible—the increase in railroad employment by legislation that would add to the operating expenses and lessen the net income of the railroads. Under private or corporation ownership and operation of the railroads, employment and wages must depend upon and bear a definite relation to traffic and revenue. When and as increased traffic and revenues bring prosperity back to the railroads, it will be possible, as it was from 1920 to 1930, to deal constructively with railway wages and working rules; the policy that has been followed since 1930 as regards railway wages and railway employment has been of doubtful benefit to railway employees as a whole. This observation applies not only to the enactment of the Railway Labor Act of June 21, 1934, when business conditions were adverse, and to the increase in railroad wages in 1937, but applies

<sup>13</sup> The constitutionality of the Railway Labor Act of 1934 was established by the decision of the Supreme Court, rendered March 29, 1937, in *Virginian Railway Co. v. Systems Federation No. 40*.

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also and more definitely to the adoption of the Railroad Retirement Act that was approved June 27, 1934, and that was, after being held to be unconstitutional, replaced by legislation approved August 29, 1935.

The Railroad Retirement Act of 1934 was held unconstitutional by a decision of the United States Supreme Court rendered May 6, 1935, and Congress promptly adopted legislation that was thought not to be violative of the Constitution as interpreted by the Supreme Court. Two laws were enacted by Congress, both of which were approved August 29, 1935, one law being the Railroad Retirement Act, and the other law the Railroad Employees' Excise and Income Tax. The provisions of the retirement law applied to employees in the service of express companies, a sleeping-car company, or a railroad company (and the subsidiaries of such companies) subject to the Interstate Commerce Act. Employees who may become representatives of "employee organizations" were also included; but the Act of 1935 avoided one of the mistakes of the Act of 1934 by not including, among the beneficiaries of the legislation, former employees no longer in service. The funds required for the payment of annuities were to be appropriated by Congress and the annuities were to be paid by the Disbursement Division of the United States Treasury to those persons whom a Railroad Retirement Board, created by the Act, certified to be entitled to payments. The Railroad Employees' Excise and Income Tax imposed an excise tax upon the carrier of  $3\frac{1}{2}$  per cent "of the compensation not in excess of \$300 per month paid by it to its employees after the effective date" of the Act. An income tax of like amount was placed upon the wages, not in excess of \$300 per month, of each employee, the employer to deduct this income tax from the wages of employees and pay the same, together with the excise tax, into the Treasury of the United States. Congress thus sought to avoid violation of the Constitution by substituting a Federal tax for a compulsory pension levy upon the carriers and their employees.

The provisions of the Railroad Retirement Act and the Railroad Employees' Excise and Income Tax Act were not entirely satisfactory, either to the railroad employees or to the railroad companies. The enforcement of the Act was enjoined June 26, 1936, by

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the Federal Court of the District of Columbia upon action instituted by the railroads. The grounds upon which the Federal Court issued the injunction were that the Railroad Retirement Act and Railroad Employees Excise and Income Tax Act "so dovetail into one another as to create a complete system substantially the same as that created by the Railroad Retirement Act of 1934, held unconstitutional by the Supreme Court." In other words, the taxes imposed by the Act of 1935 were not for the general welfare, but to secure funds for a specific purpose for which the funds of the contributors could not be taken without violation of the "due process" clause of the Constitution that in effect prohibits the taking of property without just compensation. As the Judge said in his decision, "it was clearly the intention of Congress that the pension system created by the retirement act should be supported by the taxes levied upon the carriers and their employees."

The railroad carriers were not opposed to retirement pensions; indeed, many of them had provided company pensions for retired employees. Accordingly, injunction against the collection of funds under the terms of the Tax Act of 1935 led to conferences between the representatives of the Association of American Railroads and of the Railway Labor Executives Association; and as a result of protracted negotiations an agreement was reached as to pension legislation that would be acceptable to both the carriers and the employees. Acts embodying the provisions of the agreement were adopted by Congress, and became effective July 1, 1937. The main features of the legislation thus agreed upon may be briefly summarized as follows:

There is to be a tax to be paid into the Treasury of the United States upon employee pay-rolls, not in excess of \$300 per month for any employee, the tax to start at  $5\frac{1}{2}$  per cent and to increase gradually to  $7\frac{1}{2}$  per cent at the end of 12 years. One half of the tax is to be paid by the carriers, the other half by the employees by deduction from their salaries or wages. The pension or annuities are to be paid out of the United States Treasury, the validity of this method of taxation and payment being established by the agreement of the parties in interest.

The provisions of the Railroad Retirement Act of 1935 are modified in several particulars but for the most part in details

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rather than in principle. The act is to be administered by the Railroad Retirement Board that was provided for by the 1935 Act, and the method of computing annuities which are payable monthly, is not changed. It is as follows:

Annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the total number of years of service not exceeding thirty years by the following percentages of the monthly compensation: 2 per centum of the first \$50; 1½ per centum of the next \$100; and 1 per centum of the compensation in excess of \$150. . . . No part of any monthly compensation in excess of \$300 shall be recognized.

An employee may retire at 65 years of age. He may also retire at 60 years of age, if he has served 30 years, but with a reduction in his annuity of one-fifteenth for each year under 65. An employee may continue in service after reaching 65, but if he does he will continue to pay the tax on his wages, and in the reckoning of his annuity he will not be credited with the years after he is 65.

The present pension rolls of railroads having pension systems are to be taken over, and annuities under the new system are payable.

Annuities are not payable to an employee who retires and engages in "regular gainful employment" in some other work.

A death benefit of a moderate amount is payable to the surviving widow or to the estate of the deceased. On making an application for an annuity an employee may apply for a reduced annuity payable during his life and the life of a surviving wife, the present value of such an annuity to be "determined on the basis of the combined annuity tables with interest at 4 per centum per annum."

The employees covered by the Railroad Retirement Act will not enjoy the benefits receivable under the Social Security Act. The minimum annuity receivable is \$20 or the full amount of the employee's compensation, if that should have been less than \$20 a month. "In no case shall the value of the annuity be less than the value of the old-age benefit he would receive under Title II of the Social Security Act."

There is no maximum limit to the annuity payable, the amount being determined by the general formula by which annuities are

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reckoned. It is estimated that with the return of railroad traffic to the 1929 level about 1,400,000 employees will come under the provisions of the Railroad Retirement Act.

### GENERAL CONCLUSIONS

The foregoing summary of the legislation that has been enacted from 1888 to the present to facilitate the mediation and arbitration of railroad labor disputes, to further the adoption by the carriers and employees of standardized agreements as to wages and working rules, to provide Government agencies for the adjustment of disputes as to agreements, and to establish retirement annuities or allowances for railroad employees shows that, as the result of a long evolution, the relations of railroad carriers and their employees have been comprehensively regulated by the Government. The wisdom of the present policy of the Government must necessarily depend upon whether it is in accordance with the principles that should be controlling in legislation concerning railroad labor. Some of the legislation in question was enacted to meet emergency situations such as developed in 1912 and 1916. Legislation regarding railroad labor has also been influenced by the labor policy carried out by the United States Railroad Administration during the period of government operation of the railroads, a policy that was doubtless intended to cope with labor conditions created by the war but was also a policy that may have been affected by political considerations. Moreover, it hardly need be said that railroad labor legislation, like much other legislation, may represent in part the thought and effort of disinterested idealists and may be in part the result of negative and affirmative pressure of organized interests. Railroad labor is well organized and the major organizations coöperate efficiently. Congressional legislation concerning railroad labor during the last few years has, for the most part, been such as the Railway Labor Executives Association favored.

One general principle concerning which there can hardly be any difference of opinion is that the development of the railroads should not be prevented, nor seriously hampered, by government regulation. It is for the best interests of the employees as well as

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the public that the railroads should be able, under honest and efficient management, to enlarge their traffic and facilities, to employ more men, and to render their services with increasing efficiency.

Furthermore, government regulation of railroad labor and the administration of that legislation should not seek to place railroad wages and conditions far out of line with the wages and working conditions prevailing in other kinds of transportation and in industry generally. Railroad legislation, it is obvious, should be fair to the carriers, and should not place an unfair burden upon the general public which must support the railroads as a necessary transportation facility and which is interested in the progressive development of the railroads. In the long run, the interests of the employees, the carriers, and the public are alike. The welfare of railroad labor as a whole, wages, working conditions, and number of men employed, is bound up with the prosperity of the carriers. A railroad labor policy that prevents or seriously limits the progress and prosperity of the employing carriers, whether such policy be embodied in legislation or be made mandatory by labor organizations, will be detrimental to labor as well as burdensome to the carriers and the public.

One general principle of legislation that has not been observed in the regulation of labor and employer relations is that the obligations imposed by government regulation should be enforceable against all parties concerned, both employers and employees. While legislation should protect labor, it should not exempt labor organizations from legal responsibility for their actions. Such organizations are not required to incorporate. Their officials are subject to the legal obligations of other citizens, but the organizations of which they are officials have no corporate entity and no corporate responsibility. The purpose of recent railroad labor legislation has been not only to define the rights of labor, and to protect laborers in the exercise of their rights, but to strengthen the position and power of railroad labor organizations, to make the national organizations the sole representatives of labor, and thus to enable such organizations to establish country-wide standards and to enforce their demands. There are undoubtedly those who believe that this policy is essential to the protection of labor and the maintenance of equitable relations of employers and em-

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ployees; but there is also unmistakable evidence of the fact that the policy that has been embodied in recent railroad labor legislation has been adopted because of political pressure exerted by the organizations that have sought the enactment of such legislation. Unfortunately, railroad labor regulation is not the only legislation that has been brought about by the exercise of political pressure by efficiently organized interests.

Another query as to the principles involved in recent railroad labor legislation was raised by the enactment of the Railroad Retirement Acts of 1934 and 1935. Should plans for employee retirement allowances or pensions be devised and carried out by joint action of employers and employees, or should such plans be devised by the Government and made mandatory? Many railroad companies had long since established pension systems which were being successfully and satisfactorily operated. Would it not have been a wise policy for the Government not to have interfered with existing pension systems, but to have encouraged by appropriate regulatory measures, that would not have been unduly burdensome to the carriers and their employees, the establishment of pension systems by carriers that had not put such systems into operation? Furthermore, is it not a sound social principle that, if a government retirement allowance and pension is to be applied to railroad carriers and laborers, it ought to be a part of a general retirement allowance and pension plan applying to carriers and laborers in other kinds of transportation and in large-scale industry in general? If this question is answerable in the affirmative, it follows that the Railroad Retirement Acts of 1934 and 1935 were a species of special legislation violative of sound principles of social policy and justice.

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## CHAPTER XII

### GOVERNMENT REGULATION OF RAILROAD CHARGES I. FEDERAL LEGISLATION

THE establishment of rates and fares that are reasonable in amounts, just alike to carriers and the public, and that do not unfairly discriminate as between persons or places served is the major concern of government regulation of railroads and, indeed, of all transportation agencies. When the government regulation of railroads was undertaken by the states in the eighteen-seventies and by the Federal Government in the following decade, the thought foremost in the minds of the public was to prevent the powerful railroad companies, either by individual or joint action, from charging extortionate rates. That unregulated railroad charges were highly discriminatory as between large shippers and small shippers, and as between competitive and non-competitive points of shipment, was manifest and was an injustice calling for correction. For several decades the emphasis of government regulation of railroad rates was placed upon preventing the carriers from combining to limit competition, and upon correcting so far as possible the discriminations in charges that resulted from unregulated competition.

In general, the Federal Government for some time pursued what may be called a negative policy of correcting abuses. This policy was made less negative and more positive in 1910, when Congress gave the Interstate Commerce Commission power to act upon its own motion in prescribing rates; and the policy was made fully positive by the Transportation Act of 1920 which made it the duty of the Commission in establishing and adjusting railroad charges to "give due consideration, among other things, to the transportation need of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

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While the reasonableness *per se* of railroad rates and their relative fairness as between persons, places, and commodities are now, and always will be, the concern of government regulation, the larger and long-run purpose of such regulation has now become twofold: to further the development of adequate and progressively efficient and economical railroad transportation, and to bring about such relationship between the railroads and other carriers as will promote the formation of a national transportation system comprising all classes of carriers, each performing the services it can most economically and efficiently render. This larger purpose of government regulation of railroads and other carriers, has, as yet, been but very partially realized, but it represents the ultimate goal to be attained by a constructive policy of government regulation of transportation.

Railroad rates and their regulation by the Government have been discussed by many authors. Some entire volumes and the major or a large portion of many treatises on railroads and on transportation have been devoted to describing railroad freight classifications, freight-rate structures and passenger fares, and to presenting a historical, descriptive, and critical discussion of their regulation by the Government.<sup>1</sup> In the present volume,

<sup>1</sup> Among the books that have dealt almost entirely with railroad charges mention may be made of Wm. Z. Ripley, *Railroads Rates and Regulation* (1913); Walter C. Noyes, *American Railroad Rates* (1905); H. G. Brown, *Transportation Rates and Their Regulation* (1916). Books devoted in large part to railroad charges include, among others, H. B. Vanderblue and K. F. Burgess, *Railroads: Rates-Service-Management* (1923); Frank H. Dixon, *Railroads and Government* (1922). All transportation textbooks discuss railroad charges, varying degrees of emphasis being placed upon the subject by different authors. Mention may be made of Eliot Jones, *Principles of Railway Transportation* (1924); Sidney L. Miller, *Inland Transportation Principles and Policies*, revised edition (1933); Stuart Daggett, *Principles of Inland Transportation*, revised edition (1934); E. R. Johnson and G. G. Huebner, *Railroad Traffic and Rates*, Vol. I (1911); E. R. Johnson and T. W. Van Metre, *Principles of Railroad Transportation*, last edition (1921); E. R. Johnson, G. G. Huebner and G. Lloyd Wilson, *Principles of Transportation* (1928). Students of government regulation of railroad charges will find of especial value the comprehensive treatise upon *The Interstate Commerce Commission* being written by I. L. Sharfman. Four volumes of this work have thus far appeared; Vol. I, dealing with *The Legislative Basis of the Commission's Authority*, was published in May, 1931; Vol. II upon *The Scope of the Commission's Jurisdiction*, in November, 1931; and Part III, Vol. A, upon *The Character of the Commission's Activities*, in May, 1935; Part III, Vol. B, February, 1936, discusses *Rate Regulation*, while the concluding volume of the series will treat of the Commission's organization and

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which deals with the several phases of the government regulation of all agencies of transportation, the discussion of the public regulation of railroad charges must be limited to a proportionate share of the treatise as a whole, and must thus be made a survey, or an abbreviated account, of the subjects that would necessarily be included in considering what the states and the Federal Government have done and are doing.

Such a survey need make but a brief statement regarding the policy of the states, but consideration should be given to: (1) the development and present scope of Federal legislation regarding railroad rates and fares; (2) the main features and the present status of freight classification and government policy regarding the same; (3) the basis of freight rates, the general factors that have determined freight rates, and the principles that should be controlling in government regulation of railroad charges; (4) the question of the standardization of freight classification and rates by government regulation and to what extent emphasis should be placed upon cost of service and distance scales in determining rate structures; (5) the major present problems of the regulation of freight rates, and (6) the government regulation of railroad passenger fares. Each of the subjects will be considered in turn. The present chapter will be devoted to legislation.

In previous chapters, the principles that should control in the government regulation of transportation, the regulatory authority possessed by the states and the Federal Government, and the agencies by which regulation is exercised have been considered. Thus the powers of the state and national governments to regulate railroad charges have been defined and the organization and the functioning of the Interstate Commerce Commission have been described; accordingly, the present chapter may concern itself with the legislative and administrative policy of regulating railroad charges that has been developed. The following chapter will consider the results as regards freight classification and freight-rate structures that have followed, and some of the major problems that have confronted the Interstate Commerce Commission and are now being considered by that body. The subject is mani-

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festly so large as to preclude a detailed treatment if the discussion of it is to be kept to a proportionate part of a single volume dealing with the many phases of government regulation of transportation as a whole and of the general classes of carriers concerned therewith. As is characteristic of other parts of this treatise, emphasis will be placed upon the possibility of constructive regulation of railroad charges and upon the discussion of present problems involved in such regulation.

### REGULATION OF RAILROAD CHARGES BY THE STATES

A brief statement concerning the regulation of railroad charges by the states will suffice. While, in theory, the states have sole authority over intrastate commerce, and transportation incident thereto, the fact that practically all railroad companies engage in both interstate and intrastate transportation and use their equipment and facilities in common for both services, and the further fact that the power of the Federal Government over interstate commerce and carriers is plenary and cannot be limited by the states in their regulation of intrastate commerce and carriers, tend to restrict the authority of the states over intrastate railroad charges within a field that grows ever narrower as commerce and transportation become more national in scope and as the services of carriers become more integrated. We are developing our interstate railroads into an interrelated country-wide system; and are definitely aiming to coördinate all the agencies of carriage, railroads, highways, waterways, and airways, into a national transportation system.

This does not mean that the states have been or will be eliminated from the regulation of intrastate carriers by rail, road, water, or air; many local regulations as to safety and as to services and charges of railroads, and especially of highway carriers, will come within the jurisdiction of the states. However, as regards the government regulation of railroad charges, the subject with which we are here concerned, the authority of the states must be so exercised as not to burden unjustly interstate commerce and carriers. The plenary power of the Federal Government established by the Supreme Court in 1824, speaking through Chief Justice

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Marshall in *Gibbons v. Ogden*,<sup>2</sup> has been given added scope and significance by the decision of the Supreme Court in the *Shreveport Case* <sup>3</sup> in 1914, by the provision of the Transportation Act of 1920, which gives the Interstate Commerce Commission power to change state-made railroad rates when the Commission finds such rates to result in preference or prejudice or discrimination against interstate or foreign commerce, and by the Supreme Court's decisions rendered in 1922, in the New York and Wisconsin rate cases <sup>4</sup> upholding the Commission in requiring the states so to adjust intrastate railroad rates and fares as to bring them into equitable relation to charges that the Commission may have fixed upon interstate traffic. Acting under the authority given it by Congress in legislation that has been sustained by the Supreme Court, the Interstate Commerce Commission fixes the general levels of interstate railroad rates and fares, and the states are, in effect, prohibited from fixing intrastate charges below those levels, because by so doing they would shift to interstate commerce and carriers a part of the burden that should be borne by intrastate commerce.

The limitation upon the power of the states that prevents them from fixing intrastate railroad charges that would unduly burden interstate commerce or that would restrict the regulation of interstate commerce and carriers by the Federal Government is in the interest of the country as a whole. A country-wide, consistent, and non-discriminatory system of railroad charges is made possible; and, when the Federal Government takes up, as it eventually will, the adequate regulation of interstate carriers by water and air, it will also be possible to bring about the adoption and maintenance of a national policy as regards transportation charges in general. The several agencies of transportation may thus be really coordinated in rendering services at rates that will be equitable as between carriers, as between interstate and intrastate commerce, and as between different sections of the country.

When the entire field of transportation regulation has been adequately occupied, the state authority and Federal authority will function coöperatively. The states will be concerned with local

<sup>2</sup> Chap. V, pp. 68-69.

<sup>3</sup> Chap. VII, p. 101.

<sup>4</sup> *Ibid.*, p. 101.

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transportation facilities and agencies, in general, and particularly with the facilities, services, and charges of motor carriers, the majority of whom will always be operating within state boundaries. The states can also individually and in groups function helpfully by aiding the Interstate Commerce Commission, or such other agency as may take its place, in administering Federal legislation and regulations based thereon. Indeed, the efficient Federal regulation of interstate motor transportation and carriers will doubtless be possible only by the coöperative action of Federal and state authorities. At the present time the states assist the Interstate Commerce Commission in carrying out some of the provisions of the Interstate Commerce Act; and as the United States carries on the task of regulating interstate motor carriers and of exercising adequate authority over carriers by water, greater administrative assistance by the states will be needed and can be rendered. We shall in the future hear less of the rights of the states as against the Federal Government in matters of transportation regulation, and more of the coöperation of the states with the National Government in giving effect to a common purpose—to the constructive regulation of the services and charges of the carriers comprised within an integrated country-wide transportation system.

### FEDERAL LEGISLATION FOR THE REGULATION OF RAILROAD CHARGES: THE ACT OF 1887 AND PROBLEMS OF ENFORCEMENT

The Federal regulation of railroads began with the Interstate Commerce Act of February 4, 1887. This discussion is concerned only with the provisions of this and subsequently enacted statutes that have to do with the government regulation of railroad rates and fares. The first three sections of the Act of 1887, which were similar to the provisions of the British Act of 1854, prohibited the railroads from charging unreasonably high or unjustly discriminatory rates and fares; Section One declared every unjust and unreasonable charge to be unlawful; Section 2 prohibited unjust personal discriminations in the form of special rates, rebates, or otherwise; while Section 3 made unlawful unjust discriminations between localities, commodities, and connecting lines. One other kind of discrimination, and one not mentioned in the British stat-

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ute, was prohibited by Section 4 of the Act of 1887, the long-and-short-haul clause, which made it unlawful for a carrier to make a greater charge for "the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

Later sections of the Act of 1887 provided for an Interstate Commerce Commission of five members to administer and enforce the Act. The Commission upon complaint of an interested party or upon its own motion could investigate the charges and practices of carriers, and if the Commission found such charges or practices to be unlawful it could order the carriers to desist from making unlawful charges and from engaging in illegal practices. The general function of the Commission was thus to decide what was or was not in accordance with the requirements of the statute, to order carriers to cease from unlawful acts, and to award damages payable by carriers to those who had suffered injury.

The Act of 1887 did not accomplish all that was expected of it. It was the first Federal law upon a complicated problem which involved unsolved economic and legal questions; but, although the Act failed to fulfil the purpose of its enactment, the experience gained in its administration was of especial value in showing what were the requisites of public regulation of railroads, and what legislation and administrative procedure were required for success.

The first shortcoming of the Act of 1887 was that the orders of the Interstate Commerce Commission were not binding upon the carriers. The carrier might ignore an order of the Commission; and, if that was done, the Commission could secure the enforcement of its order only by obtaining from a United States circuit court a decree enjoining obedience on the part of the carrier. This prevented the Commission from being an administrative body capable of giving effect to the Act to regulate commerce. It could only investigate and decide, but could not make its decisions effective.

Moreover, as an investigating body the powers of the Commission were greatly limited for several years by two causes: the



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Commission could subpoena witnesses, and the Act of 1887 provided that no witness might refuse to testify on the ground that his testimony might tend to incriminate him. The law protected the witness from future *criminal* prosecution based upon the testimony he had been compelled to give, but did not exempt him from civil prosecution; and in 1890 the Supreme Court ruled that the Fifth Amendment to the United States Constitution afforded witnesses "absolute immunity against future prosecution."<sup>5</sup> In 1893, Congress passed a law giving witnesses protection against prosecution, either criminal or civil, on account of testimony they were compelled to give. Even this statute did not immediately settle the question, because some of the Federal courts held that exemption from future prosecution did not give a witness the protection afforded by the constitutional proviso that he should not "be compelled, in any criminal case, to be a witness against himself." However, in 1896, the Supreme Court ruled that the Act to Regulate Commerce, as amended in 1893, by granting witnesses full immunity from future prosecution, gave them all the protection guaranteed by the Constitution.<sup>6</sup>

This decision was helpful to the Commission but its efficiency as an investigating body had for a number of years been impaired by a practice followed by the courts in cases brought by the Commission to secure a decree enforcing its orders. The Act of 1887 stipulated that the courts should accept the Commission's finding of facts as *prima facie* correct, which the courts did; but, beginning in 1889, the circuit courts permitted the defendants to introduce evidence that had not been presented to and passed upon by the Commission.<sup>7</sup> The effect of this practice by the courts was to cause the carriers to regard the Commission's investigation as only a preliminary hearing and to reserve their most important testimony for presentation to the court, if a case should be brought in the courts for the enforcement of the Commission's decision. Complainants bringing cases before the Commission might thus incur greater expense and be subject to long delays in securing a

<sup>5</sup> *Counselman v. Hitchcock*, 142 U.S. 157.

<sup>6</sup> *Brown v. Walker*, 161 U.S. 591.

<sup>7</sup> The practice was started by Associate Justice Jackson in *Kentucky and Indiana Bridge Co. v. Louisville and Nashville Railroad Co.*, decided Jan. 7, 1889, 37 Federal Reporter 567.

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final decision concerning their complaint. This practice of the carriers was discountenanced by the Supreme Court, in 1896, in the *Social Circle Case* when it stated that the carriers should present all material facts to the Commission.<sup>8</sup> Since then the courts have been increasingly careful to separate economic from legal questions and to confine their review of the Commission's decisions to questions of law.

In adopting the Act of 1887, prohibiting unreasonable rates and unjust discriminations and creating a commission to administer the law, Congress doubtless expected that the Commission would be able to correct rates and practices that the Act made unlawful. The Commission was given authority to determine whether rates and discriminations were reasonable and just and to order carriers to desist from making charges that had been found to be unlawful. The Commission, however, was not given the affirmative power to prescribe the rates that carriers must charge in the future. For about a decade the Commission assumed that in deciding what rates were unreasonable or unjust it would by so doing reach a decision as to what rates were reasonable and just, and could inform the carriers what charges they might lawfully make. For a while, the carriers acquiesced in this interpretation of the law, but later contested the power of the Commission to prescribe rates, and in 1897, the question having reached the Supreme Court, the Court held "that the power to prescribe rates or fix any tariff is not among the powers granted to the Commission."<sup>9</sup>

At the present time the standards of reasonableness and fairness in railroad rates are relatively definite; but such standards have resulted from a long experience of the Commission in dealing with rate questions and of the courts in passing upon the legality of the Commission's decisions. The Commission's early difficulties connected with passing upon the fairness and legality of rates and discriminations were due in part to the imperfections of the Act of 1887. While the Act provided that only published rates were lawful, the rates might be reduced on three days' notice, and as

<sup>8</sup> *Cincinnati, New Orleans and Texas Pacific Railway v. Interstate Commerce Commission*, 162 U.S. 184.

<sup>9</sup> *Interstate Commerce Commission v. Cincinnati, New Orleans, and Texas Pacific Railway Co.*, 167 U.S. 479. This is usually referred to as the *Maximum Rate Case*.

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the time between the later part of the first day and the early part of a third day was only a little more than 24 hours, it was possible for favored shippers to be given information of rate changes before such changes became generally known. Moreover, in order to prove that preferential treatment had been accorded to individual shippers, it was necessary to show that rates lower than published rates had actually been given, and that other shippers had been charged higher rates at the same time for similar shipments.<sup>10</sup> Proof of personal discriminations was very difficult, and continued to be practically impossible until the passage, in 1903, of the Elkins Act which, in effect, made any deviation from the published rate *ipso facto* proof of unlawful discrimination, for which a severe penalty was imposed.

Another problem of discrimination in rates has from the beginning of government regulation to the present been found by the Commission and Congress to be difficult of satisfactory solution. This problem is that of the relation of long- and short-haul rates. The original fourth section of the Act of 1887 prohibited a higher charge for "the transportation of passenger or of like kind of property, under substantially similar circumstances and conditions . . . over the same line," and in the same direction. For a while it was contended that, when two or more connecting railroads formed a joint line, each of the component roads constituted a line, and that the prohibitions of the statute applied to the line of each company and not to the through route or joint line formed by the connecting carriers; but the Supreme Court in the Social Circle Case, to which reference has been made, declined to accept that definition of the word "line" and held that the rates over the joint line must not be less than rates over a part thereof. The fourth section, however, was practically nullified 10 years after the Act of 1887 became a law, by the interpretation given by the Supreme Court to the phrase "under substantially similar circumstances and conditions." The Commission had held that, as the Act of 1887 was not intended to do away with inter-railway competition, the presence of competition of two or more railroads at the more distant point and the absence thereof at an intermedi-

<sup>10</sup> *Principles of Railroad Transportation* (1921), by E. R. Johnson, and Van Metre, p. 460.

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ate point did not create dissimilar circumstances and conditions as between the two places; but, in 1897, the Supreme Court in the Troy Case <sup>11</sup> overruled the Commission and decided that the competition of rival railways might create conditions different from those at a non-competitive point and might warrant a carrier in disregarding the fourth section of the Act of 1887, which section became practically a dead-letter until, by the Mann-Elkins Act of 1910, the phrase "under substantially similar circumstances and conditions" was eliminated.

### THE EXPEDITING ACT AND THE ELKINS ACT OF 1903

The defects in the Act of 1887 as interpreted by the Supreme Court were corrected by a series of acts adopted by Congress in 1903, 1906, and 1910. The Acts of Congress also made the scope of government regulation of railroads much broader than was contemplated by the original Interstate Commerce Act. Two statutes were enacted in 1903. One was the Expediting Act of February 11th which gave cases involving the enforcement of the Interstate Commerce Act and the Antitrust Act of 1890 precedence over other cases. The railroad and antitrust cases were to be heard originally in a circuit court and by not less than three Federal judges. If appeal was taken from the decision of a circuit court it had to be made within 60 days, the purpose being to prevent the long delays that often occurred in reaching a final determination of questions by the Supreme Court.

The other law adopted in 1903 (February 19th) was the Elkins Act which contained not only the provision that has been referred to, making a deviation from the published rate proof of unlawful discrimination, but also other important stipulations. The shipper accepting a rebate was made equally guilty with the carrier granting the rebate; the previous penalty of imprisonment for violation of the law was abolished and heavy fines were substituted therefor; and a circuit court, upon petition and allegation of facts by the Commission, could issue an order enjoining observance of published rates and discontinuance of discrimination.

<sup>11</sup> Interstate Commerce Commission *v.* the Alabama Midland Railway Co. and Others, 168 U.S. 144.

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### THE HEPBURN ACT OF 1906

The Elkins Act gave real publicity to railroad rates and made them somewhat more stable, but it did not give the Commission power to substitute a reasonable rate for an unreasonable charge. The Commission was first given power to fix rates by the adoption by Congress, June 29, 1906, of the Hepburn Amendment to the Act to Regulate Commerce. The Hepburn Act first made possible the effective administrative regulation of the railroads and allied carriers by the Commission. The scope of regulation was broadened by making the Act applicable not only to railroads but also to express companies, sleeping-car companies, and pipe-lines other than those for water and gas. Railroads were defined to include "switches, spurs, tracks, and terminal facilities" and transportation subject to the Commission's regulation was made to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof and all services in connection with the receipt, delivery elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." This brought industrial railroads, private-car lines, and all agencies directly connected with railroad transportation under the provisions of the Act, and made it possible for the Commission to prevent discriminations resulting from granting undue allowances to industrial railroads, and to prohibit carriers from making unreasonable charges for switching or terminal services. Carriers were required, when application was made, to make switching connections with a lateral branch-line railroad and with the private side-tracks of shippers when such connections were practicable, safe, and justifiable. The performance of the added tasks placed upon the Commission was furthered by increasing its membership from five to seven men and their salaries from \$7,500 to \$10,000 per annum.

The Hepburn Act contained the "commodities clause" which made it unlawful, after May 1, 1908, for a railroad to transport interstate any commodity, other than lumber and manufactures thereof, which was mined or produced by the railroad or under its authority except commodities used by the railroad in its own

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operation. This provision was included in the law especially to put an end to railroad ownership of coal mines and to the practice of certain railroads of granting to themselves as carriers or shippers lower rates than other coal shippers were charged.

One important limitation was placed upon making discriminations in rates by requiring 30 days' notice of all changes in railroad rates. Formerly rates might be increased on ten days' notice and lowered on three days' announcement. Whether wisely or not may be doubtful, but the Hepburn Act restored the possible penalty of imprisonment instead of fines, for charging other than the published rates, the penalty running against the recipient as well as the giver of rebates. Those who received rebates were also subject to forfeiture to the United States of three times the amount of rebates received. However, another doorway for the entrance of discriminations into rate schedules that should have been closed by the Hepburn Act, but was left open until 1910, was the one by way of the fourth section of the Interstate Commerce Act which had been practically nullified by the phrase "under substantially similar circumstances and conditions."

The Hepburn Act carried government regulation of railroads far beyond the point it had previously reached. Three provisions of the law made this possible: the Interstate Commerce Commission was given the power to fix rates; its orders had to be obeyed by the carriers unless they got a court decree enjoining the enforcement of the order; and the Commission was given authority to prescribe and enforce a uniform system of carrier accounts, statistics, and reports.

The Commission's authority over railroad rates was much more limited than at present. The carriers' tariffs as filed with the Commission automatically became effective in 30 days. The Commission could change the rates only upon complaint by an interested party and after a hearing. The Commission could not take the initiative in the correction of rate schedules and structures. Moreover, the Commission could prescribe only maximum rates; it could not fix the minimum or the absolute rates. This made it possible for the railroads in competing with each other or with carriers by water to publish and file rates lower than the maximum charges fixed by the Commission and thus to make unfair dis-

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criminations between places and between commodities. It was not until the Transportation Act of 1920 was adopted that the Commission was empowered to fix the actual rates to be charged by carriers subject to its jurisdiction.

The Commission first became an effective administrative body when the carriers subject to the Interstate Commerce Act were required to carry out the decisions and orders of the Commission unless the carrier could convince a United States circuit court that the Commission's action was without legal authority or that the law upon which the Commission's action was based was unconstitutional. The statute was careful to protect the legal rights of the carriers; the circuit courts were definitely authorized to enjoin the enforcement of an order of the Commission, but the carriers and not the Commission had to take the steps required to determine the validity of an order. If a rate was fixed by the Commission and the court issued a temporary restraining order the old rate remained in force until the court reached its final decision. Undue delay was prevented by the Act expediting the hearing and determination of cases involving the enforcement of the Interstate Commerce Act.

Following the enactment of the Hepburn Act the Commission prescribed a uniform system of accounts that all carriers subject to its jurisdiction were required to adopt, and the Commission was authorized by the law to employ the force of inspectors necessary to enforce its requirements. By means of uniform carrier accounts and statistical practice, and by means of regular and special reports based thereon, the Commission was able to secure the information necessary to the intelligent regulation of carriers. Uniformity and publicity of carrier accounts and records, moreover, helped to reveal the problems to be solved in effecting the adequate government regulation of the railroads and other carriers.

### THE MANN-ELKINS ACT OF 1910

Valuable as was the Hepburn Act, additional supplemental legislation was soon found to be needed to enable the Commission to regulate railroad rates. This legislation was supplied by the Mann-Elkins Act of June 18, 1910, which gave the Commission

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authority to bring about changes in rates upon its own initiative and to suspend proposed rates pending an investigation, and which revitalized the long-and-short-haul (fourth) section of the Interstate Commerce Act by eliminating the phrase "under substantially similar circumstances and conditions" and by making the requirements of the section mandatory, carriers being obliged to obtain the prior approval of the Commission before fixing lower rates for the longer than for the shorter haul.

The power to suspend rates proposed by the carriers gave the Commission real control over railroad charges. The statute provided that when rates were filed, the Commission, upon complaint of an interested party or upon its own motion, might suspend the proposed rates for 120 days, and, if necessary for completion of the hearings, for an additional period of six months. The burden of proving that the proposed rates were just and reasonable was upon the carrier; and the Commission might either approve or disapprove the proposed rates or require a modification of the rates as a condition of approval.

The Commission's power to modify rate systems, and, as experience has demonstrated, to develop systematic railroad-rate structures was granted by Section 13 of the Mann-Elkins Act which authorized the Commission to "institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." The Commission has investigated and remodeled, one after the other, the rate structures in the Southern Territory, New England, Central Freight Association Territory, Southwestern Territory, Eastern Trunk Line Territory, and in the Territory of the Transcontinental Lines. This was accomplished over a period of about 20 years, along with the many other investigations incident to the enforcement of the Act to Regulate Commerce as it has been amended and enlarged in scope. Numerous additional and special investigations by the Commission have been required by Congress, the largest of them being those under the Hoch-Smith Resolution of 1925 to which reference has been made.<sup>12</sup> The Mann-Elkins Act, supplemented as it has been by the Transportation Act of 1920, which will be considered presently, has enabled the Commission to put railroad class rates in

<sup>12</sup> See Chap. IV, p. 53.



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each section of the United States upon a definite and logical basis, and much progress has been made in applying distance rate scales to ex-class traffic.

It was thought a few years ago that all railroad freight rates were soon to be based upon a stable and theoretically sound basis; and such might have been the outcome, had it not been for the sudden prominence of motor transportation and the rapid increase in motor competition. At present the modification and simplification of railroad freight classification and of the rate systems based thereon seems necessary in order to enable the railroads to compete under like terms and conditions with carriers by highways.<sup>13</sup> In a lesser degree, the growing competition of carriers upon government-improved-and-maintained waterways will make desirable a modification in railroad practice regarding freight classification and rate-making. What policy will be adopted by the railroads, or will be approved by the Commission, regarding the reconstruction of freight classification and rate structures to enable the railroads to compete more effectively with motor and waterway carriers, it is too early to predict, but some action seems unavoidable.

The fourth section of the Interstate Commerce Act as strengthened by the Mann-Elkins Act has enabled the Commission to make extensive adjustment of rate structures, especially in the southern and western parts of the country where the non-observance of the long-and-short-haul principle was general. In other sections, also, many changes in rates have been made necessary by the enforcement of the fourth section; although the Commission may, and not infrequently does, allow carriers, in special cases, to make rates that would otherwise not be permitted by the fourth section.

Upon the recommendation of the National Waterways Commission, Congress included in Section 4 of the Act of 1910 a second paragraph which provided that:

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight

<sup>13</sup> This question is discussed in Vols. I and II of the *Freight Traffic Report*, Section of Transportation Service, Federal Coördinator of Transportation (May 1, 1935).

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to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

The purpose of this proviso of the statute is manifest. When it was adopted the Commission did not have power to fix the minimum rates that railroads might make to secure traffic in competition with the waterways. When the Transportation Act of 1920 gave the Commission control over minimum as well as maximum railroad charges, the paragraph that had been added to the fourth section ceased to have much significance, but it was retained and is included in the Interstate Commerce Act as amended to date.

One feature of the Mann-Elkins Act that was recommended by President Taft and of which much good was expected proved not to be helpful or desirable and was eliminated after three years. The statute created a special Commerce Court to take the place of the several United States circuit courts to hear suits brought to enforce the orders of the Interstate Commerce Commission, other than for the payment of money. The Commerce Court was also to have sole original jurisdiction to hear suits to set aside orders of the Commission, and to enforce the Elkins Act of 1903. The Commerce Court consisted of five judges, appeal from its decisions being to the Supreme Court. It was thought that, by having one instead of several courts to hear cases involving the enforcement of the Act to Regulate Commerce, procedure would be expedited and cases would be decided by an expert court. As might have been anticipated, however, the Commerce Court tended to become a second and superior Interstate Commerce Commission. Many decisions of the Commission were set aside by the Commerce Court, while the United States Supreme Court, in several instances, overruled the Commerce Court and sustained the Commission. The result was that the Commerce Court became unpopular, and was abolished by Congress, in October, 1913, jurisdiction over Interstate Commerce Act cases being given to the Federal district courts, not to the circuit courts in which it had formerly been vested.

In addition to the foregoing outstanding provisions of the

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Mann-Elkins Act, the statute dealt with numerous subjects among which at least three should be mentioned:

(1) Telegraph and telephone companies were added to those subject to the Interstate Commerce Act and were regulated by the Interstate Commerce Commission until by the Communications Act approved June 19, 1934, all agencies of interstate communication were placed under the regulation of a Communications Commission.

(2) The statute provided that all cases brought by or against the Interstate Commerce Commission should be brought by or against the United States; and thus made it the duty of the Department of Justice to prosecute for, or to defend, the Commission in suits involving the enforcement of the Commission's orders. The Department of Justice was authorized to employ special counsel for Interstate Commerce Commission cases, and the Commission and all other interested parties were permitted to intervene in all cases.

(3) The statute authorized the President to appoint a Railroad Securities Commission to investigate and report upon the subject of the Federal regulation of the issue of railroad securities. President Taft had recommended that Congress provide for the regulation of railroad capital; but Congress evidently thought that action should be postponed until further information had been obtained. The President selected President A. T. Hadley of Yale University as chairman, and he and his four fellow-commissioners reported in 1911 against the regulation of railroad securities by the United States Government. The Commission was of the opinion that there was but slight connection between railroad capitalization and rates, and that the regulation of capitalization would be of little benefit. The Commission also thought that the Federal regulation of railroad securities might cause a conflict of Federal and state authority.

The recommendations of the Hadley Commission were that Congress should provide for a physical valuation of railroad property by the Interstate Commerce Commission, and that full publicity of financial transactions should be required of all railroads. Two years after this report was made Congress passed the Railroad Valuation Act of March 1, 1913, but no action regarding

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the supervision or regulation of railroad financiering was taken until the passage of the Transportation Act of 1920 which provided for the efficient regulation that the Interstate Commerce Commission has since exercised over the issue of railroad securities.

### THE RAILROAD PROVISIONS OF THE PANAMA CANAL ACT OF 1912

The Act approved August 24, 1912, for the operation and administration of the Panama Canal contained some relatively important additions to the Interstate Commerce Commission's authority over railroads and their rates. The railroads were prohibited from owning, or having any interest in, vessels operated through the Canal. In the case of vessels operated elsewhere, the railroads were prohibited from having any financial interest in vessels with which they do or may compete. The Commission was to determine the facts as to such competition and was authorized to permit railroads to own and operate vessels, if such operation was in the public interest and will not prevent or reduce competition. Some railroads, notably the New Haven and the Southern Pacific, have been allowed to operate vessel lines.

The Panama Canal Act gave the Commission authority to require the physical connection of rail and water carriers, where such connection is reasonably practicable. The Commission was also given power to establish through routes by rail and water and to fix the maximum joint rates by such routes. The Commission could also establish maximum proportional railroad rates to and from ports, and could require a railroad that had entered into a through-shipment arrangement with one carrier by water at a port to enter into a similiar arrangement with other water carriers operating from such port, the purpose being to prevent the railroads from discriminating in favor of one carrier by water and against other such carriers.

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THE RAILROAD VALUATION ACT OF 1913; ANTITRUST ACT, 1914;  
ADAMSON ACT, 1916; CAR SERVICE ACT, 1917; ACT OF 1917  
ENLARGING THE INTERSTATE COMMERCE COMMISSION,  
AND FEDERAL CONTROL ACT OF 1918

This survey being concerned primarily with legislation for the regulation of railroad rates, most of the other important legislation enacted between 1912 and 1920 to strengthen the regulatory power of the Interstate Commerce Commission may be given only a passing notation. In addition to the Valuation Act of 1913, which was adopted with the hope and expectation (later found to be unrealizable) that railroad rates could be based upon the value of the property devoted to the performance of the service for which charges were made, there was the Clayton Antitrust Act of 1914, certain prohibitions in which were intended to prevent practices that increased the costs of railroad transportation; the Adamson Law of 1916, which reduced the hours and increased the cost of railway labor; the Esch Car Service Act of May 29, 1917, which gave the Commission authority to regulate car service, "the movement, distribution, exchange, interchange and return of cars"; the Act of August 9, 1917, by which Congress increased the membership of the Commission from seven to nine, and authorized the Commission to apportion its work among as many divisions as it might deem necessary, each division to consist of three commissioners; and then at the close of 1917 came, as a war measure, the government operation of railroads that had been made possible by a provision in the Army Appropriation Act of August 29, 1916, and which was carried on for 26 months in conformity with the terms of the Federal Control Act of March 21, 1918, which ratified the action of the President in taking over the railroads and which fixed the compensation to be received by the owners of the railroads during government operation.

### THE RAILROAD TRANSPORTATION ACT OF 1920

A study of Federal legislation for the regulation of railroad rates that had been enacted prior to 1920 shows that great progress had been made in the third of a century that had elapsed

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since the passage of the original Interstate Commerce Act in 1887. Such a study also reveals the fact that several problems yet remained to be solved before the regulation of railroad charges could be considered completely and satisfactorily accomplished. The Commission's regulation of railroad rates was mainly empirical and corrective of carrier practices rather than definitely constructive in purpose, but the Commission was manifestly seeking to find a logical basis upon which to build rate structures. Congress adhered to the policy of enforced inter-railway competition, instead of favoring, as it now does, the coördination of railroads and the maintenance of competition subject to Commission regulation. The boundary line separating Federal and state authority over railroad rates was being more clearly marked as a result of the decision of the Supreme Court in the Shreveport Case in 1914, but was not yet so definitely determined as it has since been by Section 13 of the Interstate Commerce Act and by the decisions of the Supreme Court in the New York and Wisconsin rate cases upholding that section.<sup>14</sup> The financial affairs of the railroads were still unregulated by the Federal Government, although it had become manifest that effective regulation of railroad security issues by the states was impossible. Moreover, the concept of government regulation of railroads as having for its general and major purpose the development of a coördinated national system of transportation was yet but vague and indefinite. The fact that the Government, when it took over temporarily the operation of all of the railroads of the country, practically put them together into a unified system, gave the public a new concept of the possibilities and advantages of greater coördination of the railroads and of the benefits of regulated instead of enforced competition of dissociated rival systems, and prepared the way for including several new principles and practices of government regulation of railroad rates and services in the Transportation Act of 1920 by which the Government withdrew from the operation of the railroads and fixed the conditions under which they should be managed in the future by their corporate owners.

<sup>14</sup> See Chaps. V and VII, pp. 72-73 and 101.

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The Act of 1920, in addition to providing for the settlement of the obligations of the carriers to the Government and of the Government to carriers resulting from the wartime control of railroad operation by the Government, contained numerous important additions and amendments to the Interstate Commerce Act. We are here concerned with the provisions having to do directly and indirectly with the fixing and regulation of railroad rates.

The most fundamental provision of the Act was the one giving the Interstate Commerce Commission power to fix the minimum or absolute rates, as well as the maximum rates, that railroads may charge, exception being made of the through rate over a joint rail-and-water route for which the Commission can fix only the maximum. In practice the Commission now determines the actual rates that the railroads may charge on interstate traffic. Likewise, when the Commission fixes the maximum joint railroad-water rate, that is the one actually charged. While the railroads continue to work out and file with the Commission tariffs of proposed interstate railroad rates it is the Commission that decides what the charges may be.

The Act of 1920, also, increased the Commission's authority to determine the maximum railroad rates that may be charged on intrastate traffic. The law gives statutory precision to the general principle established by the decisions of the Commission and the United States Supreme Court in the *Shreveport Case*.<sup>15</sup> The statute provides that whenever the Commission finds upon investigation that the railroad rates, classification of freight, or a regulation or practice adopted by a state on intrastate traffic, unreasonably discriminate against, or place an undue burden upon, interstate or foreign commerce, the Commission shall "prescribe the rate, fare or charge . . . thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment will remove such advantage, preference or discrimination." The general effect of this provision of the law, which, as has been stated, was upheld by the Supreme

<sup>15</sup> *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342. See Chap. V, p. 70.

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Court in 1922 in the Wisconsin and New York rate cases,<sup>16</sup> has been to limit the power of the states over railroad rates to fixing charges within the general level of rates established by the Interstate Commerce Commission for interstate traffic. The Commission has required the state authorities to make numerous changes in intrastate railroad rates that were held to be unreasonably related to interstate rates fixed by the Commission.

One feature of the Transportation Act of 1920 of which much was expected but which proved to be ineffective was the mandate that the Commission "in the exercise of its power to prescribe just and reasonable rates" should establish or adjust such rates "so that carriers as a whole . . . will under honest, efficient and economical management . . . earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." The statute fixed the fair rate of return for the first two years at 5½ per cent, with the proviso that the Commission might allow an additional one half of one per cent for improvements, betterments, or equipment, the expenditures for which were not to be added to railroad capitalization. At the end of the two-year period the fair rate of return was to be named by the Commission and was fixed at 5½ per cent per annum.

The purpose of Congress was to place the railroads upon a stable financial basis and to assure the adequate future development of the railroads by providing that carriers as a whole should earn a fair return upon their invested capital. It was realized that rates for like services must be the same for all carriers in each of the natural territorial or traffic divisions of the country and that rates that would yield a fair return to carriers in the aggregate would enable the best located, and best organized and managed, railroads to earn more than the return considered fair for carriers as a whole; consequently the law provided that an individual railroad company having an annual net income of more than 6 per cent upon the value of its property used in serv-

<sup>16</sup> *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co.*, 257 U.S. 561; and *State of New York v. U.S.*, 257 U.S. 591. These cases are briefly discussed in Chap. V, pp. 72-73.



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ing the public should pay into a railroad contingent fund, to be administered by the Interstate Commerce Commission, one half of its net income in excess of 6 per cent. The other half of the excess was first to be set aside by the company to build up a reserve equal to 5 per cent of the value of its property. After such reserve had been created, the carrier's half of the surplus was to be at the disposal of the company for increasing dividends or for other legitimate purposes. This was the so-called "recapture clause" of the Act.

The theory that railroad rates should be and can be based upon the value of the property used in performing the services for which the charges are imposed seems offhand to be logical and wise; but experience in administering the Transportation Act of 1920 soon made clear what might well have been realized in advance, that railroad transportation is an integral part of the process of producing goods and making them available for consumption. The economic and other factors that control production also control railroad charges. Railroad rates must be adjusted in accordance with economic conditions, and railroad net earnings are determined by those economic, social, and political causes that account for prosperous or adverse business conditions. The Interstate Commerce Commission continued to fix and adjust railroad rates after 1920, as it had before, its general purpose being to make such adjustments as would be fair to the public and to the carriers under the conditions prevailing at the time its decisions were made. In no year, even during the prosperous decade ending in 1930, was the average net income of the railroads as a whole as much as 5½ per cent of the value of their property used in performing their services.

The recapture clause was as ineffective in accomplishing the purpose that Congress sought to attain as was the rule of rate-making. Instead of creating a large contingent fund by which the Interstate Commerce Commission might assist railroads needing additional equipment or facilities, the recapture provision of the law proved to be an incubus. Some railroads that had net earnings in a prosperous year in excess of 6 per cent of the value of their used property might have, and did have, small net income or none at all in subsequent years. Some roads financially

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strong did not have net income from operation of more than 6 per cent and were thus not required to contribute to the contingent fund. In fact, a comparatively small amount was "recaptured," and, as the law had fixed 6 per cent per annum as the rate to be charged by the Government upon loans made from the fund, the railroads were able to secure funds for equipment from private sources at less cost than they could have been gotten by loans from the contingent fund. The constitutionality of the Government's taking from the railroads a part of the net income derived from charging reasonable rates fixed or regulated by the Government was questioned in the courts, but was upheld by the Supreme Court,<sup>17</sup> on the ground that a railroad "is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation."

One quite certain effect of the recapture clause, had it been carried out as intended, would have been to reduce the possible surplus that well-managed railroad companies might accumulate, or might be required to store up, during prosperous years to help them through periods of business depression. It became manifest as the traffic and revenues of the railroad carriers fell off after 1930 that both the rule of rate-making and the recapture clause of the Transportation Act of 1920 ought to be changed or eliminated, and this was done by the Emergency Transportation Act of June 16, 1933 (discussed later), which substituted a new rule of rate-making and repealed the recapture clause.

An amendment made by the Transportation Act of 1920 to the long-and-short-haul clause, Section 4, of the Interstate Commerce Act has, on account of their increasing competition with the coast-wise carriers, placed a serious limitation upon the discretion of the railroads in fixing competitive rates. The amendment limited the Commission's authority to relieve the railroads from the requirements of the fourth section by providing that "the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed"; and, also, if a circuitous railroad line is allowed to make its through rates as low as those permitted

<sup>17</sup> *Dayton-Goose Creek Railway v. U.S.*, 263 U.S. 456, decided in 1924.

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to be made by a direct railroad line, and the circuitous line is authorized to make higher charges to intermediate than to more distant points, "the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points." In enforcing this amendment the Commission has held that it, and not the carriers concerned, is to be the judge as to what rate to or from the more distant point is "reasonably compensatory for the service performed"; and the Commission since 1920 has also continued to carry out the policy that it has followed from the beginning, of not allowing the railroads to discriminate unduly against intermediate points by the rates made to the more distant points to meet the competition of carriers by water. The result has been that the intercoastal vessel lines have diverted from the railroads a large volume of traffic, some considerable share of which might doubtless have been retained by the railroads had they possessed more freedom in meeting the rates of their competitors.

There is a growing sentiment in favor of repealing or at least modifying the long-and-short-haul section of the Interstate Commerce Act, and bills to do this are pending in Congress. The question at issue is one not easily decided but on the whole it would probably be wise to give the Commission more discretion than it now has in deciding what rates the railroads may charge to meet the competition of the carriers by water. The ultimate and only adequate solution of the problem is to vest in the Commission authority to fix the rates of the carriers by water as well as of those by rail, and thus to establish and maintain both a just relationship and a proper general level of the rail and water rates.

Some other provisions of the Transportation Act of 1920, although they do not directly concern the making and regulation of railroad rates, may have an indirect influence. The Law authorizes the Commission to permit competing railroads to pool their traffic or earnings, and the Act also makes possible and favors the consolidation of the railroads into a limited number of large systems. However, the railroads with few minor exceptions have not pooled traffic or earnings; and, for reasons that will be set forth in Chapter XV, the expected consolidation of

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the railroads into a limited number of large systems has not been effected.

Among the most important provisions of the Act of 1920 were those giving the Commission authority to decide what existing railroad lines may be abandoned, what new lines or extensions of existing roads may be constructed, and what securities railroads may issue to meet existing or additional financial obligations. The Act gives the Commission control over changes in the country's railroad system and over the capitalization and financial policy of the carriers. In the long run this must determine what property shall be used in serving the public and how and in what amount that property shall be capitalized. Rates are charged to secure the revenues needed to support the property and to maintain the financial credit of the carriers; and the control by the Commission of investments made by the carriers and of their financial policies must affect the amount of net revenues needed and hence the general level of rates that will produce the required income. How the rate structures must be fixed and adjusted to produce the necessary income will, as has been stated, be determined by the prevailing economic, social, and political factors upon which business conditions are dependent.

### THE EMERGENCY RAILROAD TRANSPORTATION ACT OF 1933

Congress adopted the Emergency Railroad Transportation Act of June 16, 1933, "In order," as the law states, "to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon," and to accomplish this purpose the office of Coördinator of Transportation was created. The office was to function for one year, but might be, and in due season was, extended for another year by the President. At the end of two years Congress continued the office for a third year. As has been explained in a previous chapter, the Coördinator was to investigate railroad practices and to assist the carriers in reducing duplication of services and facilities, in eliminating practices that cause "undue impairment of net earnings," and in accomplishing "financial

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reorganization of the carriers . . . so as to reduce fixed charges.” The investigations made by the Coördinator and his staff have been of great informative value; but the immediate concrete results accomplished have been slight, mainly because economies in most railroad operating practices would necessarily temporarily reduce the number of employees, and this was made practically impossible by a section of the Act stipulating that “the number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title [the Act] below the number . . . of employees in service during the month of May, 1933” and providing that no “employee in such service may be deprived of employment such as he had during said month of May or be in worse position with respect to his compensation for such employment.” The Coördinator, however, rendered a valuable service to the public and the carriers, not only by the investigations that were made, but also, and especially, by the assistance and guidance of congressional committees in formulating two pieces of legislation that were adopted in 1935, one improving the procedure to be followed in the financial reorganization of an insolvent railroad company, and another bringing interstate motor-bus and truck transportation under regulation by the Interstate Commerce Commission.

The investigations of the Coördinator and his staff were concerned with railroad charges as well as with services, and far-reaching changes in passenger fares and freight classification and rate structures were recommended. Some of the recommended changes—those concerning merchandise freight and passenger fares—were briefly discussed in Chapter X. In general, the Coördinator emphasized the necessity of simplifying freight classification and the system of freight rates, in order thereby to bring railroad services and rates in harmony with business and transportation changes brought about by motor-buses and trucks. The future rate-making and service policies followed by the carriers and the policy of the Interstate Commerce Commission in the regulation of the carriers will doubtless be influenced by the light shed by the investigations, reports, and recommenda-

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tions made by the Coördinator of Transportation and his staff.

Two parts of the Emergency Transportation Act of 1933 that are important, but which can but indirectly and slightly affect rate-making and need only be mentioned in this connection, are the one providing for the regulation of railroad holding companies by the Commission and the one simplifying the procedure to be followed by the Commission in keeping up to date the valuations it has made of the property of railroad companies. The long-run effect of these two additions to legislation will be to make possible a more intelligent and effective regulation of railroad charges.

As has already been indicated, the most significant changes in the Interstate Commerce Act that were made by the Act of 1933 were the repeal of the rule of rate-making and the recapture clause that had been made a part of the Transportation Act of 1920, and the adoption of a brief and flexible rule of rate-making giving the Commission discretion in fixing and adjusting railroad charges. The new rule is that:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

This rule of rate-making is a concise statement of what has been, and would logically be, the policy followed by the Interstate Commerce Commission in passing upon particular rates and fares and in establishing and adjusting the general level of railroad charges in different sections of the country. Having by act of Congress, approved August 9, 1935, been given authority to regulate "the transportation of passengers and property by motor carriers operating in interstate or foreign commerce," the Commission will be able to carry out its rate-making policy more successfully. When the Commission's present authority over carriers by railroad and highway is extended to carriers by water, government regulation of transportation can be made yet more effective and of greater benefit to both the carriers and the public.

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### REFERENCES

The statutes and the court decisions referred to in the text are the sources to be consulted in the further study of the subject.

For a special study of the Transportation Act of 1920, it will be helpful to consult the volume by Rogers MacVeagh, *The Transportation Act of 1920, Its Sources, History, and Text, Together with Amendments to the Interstate Commerce Act* (1923).

## CHAPTER XIII

### GOVERNMENT REGULATION OF RAILROAD CHARGES II. FREIGHT CLASSIFICATION AND RATES AND THEIR REGULATION

THE success of government regulation of railroads or of any business activity that is brought under public control depends upon the effective administration of legislation. The general principles and the scope of regulation are determined by legislation, while it is the administrative authority created to give effect to law that must make the legislation a vital and constructive force by a wise interpretation of the principles and requirements of the laws that have been enacted and by an intelligent and practical handling of the concrete problems of regulation as they arise. When a regulatory statute is thus administered over a considerable period of time, as have been the Interstate Commerce Act of 1887 and the numerous subsequent supplements to the original law, a definite policy and a code of regulation are developed that may give the statute greater breadth and significance and make its application increasingly effective.

Such has been the history of the congressional legislation for the regulation of the railroads, as the laws have been administered by the Interstate Commerce Commission, and as the meaning of the statutes has been interpreted by the Federal courts. Starting in 1887 as a body of five members and with what soon proved to be but limited powers, the Commission has, from time to time, as was shown by the review of legislation in the preceding chapter, been given authority more definite and of wider scope. As its duties and responsibilities have been increased, the membership of the Commission has been enlarged. By the Hepburn Act of 1906, which gave the Commission power to fix rates and also added to its administrative responsibilities, the number of mem-



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bers was increased from five to seven. The enlargement of the 'Commisison's work caused Congress, in 1917, to raise the membership to nine and to authorize the Commission to organize into as many divisions as it might deem necessary. Each division was to consist of not less than three members, and a division might be authorized to act for the Commission, its decisions being subject to a rehearing by the Commission. By the Transportation Act of 1920, the number of commissioners was increased to 11. Most of the activities of the Commission, since 1917, have been carried on by the divisions and the bureaus and officials reporting to the divisions. In 1917 the Commission divided its work among six divisions. In 1935, after Congress adopted the Motor Carrier Regulation Act the Commission reduced the number of its divisions to five, of which division five is concerned with the regulation of interstate motor carriers. In 1937, a sixth division was added. In 1933, by Act approved February 28th, Congress authorized the Commission to assign work or functions to an individual commissioner or to a board consisting of an employee or employees, those affected by a decision or order of such commissioner or board to have the right of petitioning for a rehearing or reconsideration to be passed upon by the Commission.

In Chapter VIII, the organization of the Interstate Commerce Commission and the activities of the 14 bureaus it has established were described. A highly developed, but flexible, organization has been built up for handling administrative details and for performing the Commission's major task of regulating freight classification, freight rates, and passenger fares. It is with this task that this discussion is concerned. To give greater clarity and significance to the discussion of government regulation of freight classification, freight rates, and passenger fares, it will be best to set forth briefly the controlling principles and essential features of freight classification and of railroad rates and fares, and then to discuss the problems involved in the standardization and regulation of railroad freight and passenger charges. The description of freight classification and freight- and passenger-rate structures, as they have been worked out by the carriers over a long period, must be made brief, in order to keep this discussion within necessary limits.

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However, this may be done without apology inasmuch as detailed accounts may readily be studied in other publications.<sup>1</sup>

### RAILROAD FREIGHT CLASSIFICATION IN THE UNITED STATES: TENDENCIES IN GOVERNMENT REGULATION

The making of railroad freight rates is necessarily preceded by grouping into a limited number of classes the 5,000 kinds and 15,000 ratings of freight shipped over the railroads. Insofar as possible, rates are for classes of traffic and not for individual commodities. After freight has been classified, schedules of class rates are constructed for each of the traffic territories in the United States, e. g., for New England, territories of the Eastern and the Western Trunk Lines, and others to which reference will be made in discussing freight rates. As it is necessary to give some commodities lower rates than they would have if they were assigned even the rate applying to the lowest class—e. g., carload shipments of coal, ore, cement and, usually, grain—rates are made for a number of individual commodities, the number and kinds of such commodities and the rates applied to them being different in the several traffic territories.

There are three major railroad freight classifications in the United States, each in charge of a committee selected by the carriers.<sup>2</sup> For the territory east of Lake Michigan, east of and including Chicago, east of the Illinois River and Mississippi River to the mouth of the Ohio, including St. Louis, north of the

<sup>1</sup> Consult G. Lloyd Wilson, *The Principles of Freight Traffic* (1935). This excellent booklet was published by The Traffic World, Chicago, Ill.

*The Freight Traffic Red Book*, which is published annually by the Traffic Publishing Co., New York, presents detailed information concerning "Rate Factors," "Freight Classification," "Rate Territories," "Rate Bases," and related subjects.

*The Merchandise Traffic Report* (1934) prepared by the Section of Transportation Service of the staff of the Coördinator of Transportation discusses freight classification and tariffs, and *The Passenger Traffic Report* (1935) from the same source discusses passenger charges.

<sup>2</sup> In some of the States, there are freight classifications that have been promulgated by state commissions. A state freight classification is the basis only of class rates applying to intrastate shipments. In most states the appropriate major classification is the basis of intrastate class rates. In this discussion, which is concerned with the three major classifications, it is not thought necessary to consider the minor classifications in force in some of the states.

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Ohio River and a line along the Norfolk and Western Railway to and including Norfolk, there is the Official Classification, in charge of the Official Classification Committee with headquarters at New York. South of the Ohio River and the Norfolk and Western Railway and east of the Mississippi River is the territory of the Southern Classification, the offices of the administering committee being in Atlanta. In the part of the United States west of the territories of the Official and Southern Classifications, the Western Classification is in force, the headquarters of the Western Classification Committee being in Chicago. The northern peninsula of Michigan, the State of Wisconsin and the northwestern part of Illinois, though east of the Mississippi River, are in the Western Classification territory.

These three classifications all originated in the eighteen-eighties and have had a long development. There are three classifications, although one for the entire country would seem to be logical and desirable. The differences of the northeastern, southeastern, and western sections of the country in natural resources, in their industrial activities, and in the consequent characteristics of railroad traffic caused the carriers in each of the sections to have a freight classification of their own, freight in each territory being so classified as to further the economic development of the section and to be of assistance to the carriers. A large share of the freight carried by the railroads moves from one classification territory to another, and it is obvious that both shippers and carriers are inconvenienced by having the rates for such freight determined by two or three classifications, each with its own rules and regulations as to shipping requirements and the application of tariffs based upon the freight classification.

There was early recognition of the theoretical desirability of unifying the three freight classifications, and of meeting the dissimilar economic and industrial conditions and requirements of different sections of the country by giving the same class of traffic different rates in the several sections of the country insofar as that was made necessary by the varying conditions prevailing in the eastern, southern, and western parts of the United States. In 1889, two years after the original Interstate Commerce Act became a law, Congress was about to pass a law requiring the car-

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riers to adopt a unified classification, or if they failed to do so, authorizing the Interstate Commerce Commission to promulgate such a classification, but the Commission recommended that the carriers be given an opportunity to accomplish the task by voluntary action. During the two following years the railroads made an earnest but unsuccessful attempt to consolidate the three freight classifications. A similar effort was made in 1908, when the carriers appointed a joint committee to work out a uniform classification; but unity of action by the railroads again proved to be impossible. The obstacles to be overcome were found to be too great. A consolidation of the three classifications meant changing the rating of many commodities and articles, and a consequent readjustment of freight rates, a task made especially difficult by the competition of the carriers with each other and by the rivalry of the producing and manufacturing centers in different parts of the country.

A third and vigorous attempt was made to consolidate the freight classifications in 1918 and 1919. The railroads of the entire country were then being operated by the United States Railroad Administration, and it was thought that the Government might do for the railroads what they had been unable to accomplish by common action. A consolidated classification was worked out by the Railroad Administration and submitted, in 1919, to the Interstate Commerce Commission. The Director-General, realizing that the proposed classification would be opposed by many shippers, desired the Commission's approval; but the Commission, after hearing the opponents of the unified classification, withheld its approval, because it appeared that the plan of reclassification would have the effect of unduly increasing rates, of making more changes upward than downward.

The efforts of the Railroad Administration to bring about a consolidation of freight classifications were partly successful. The rules and regulations concerning the application of the three classifications were unified; and the three classifications were, and since then have been, published in one book instead of separately. The "Consolidated Freight Classification" book contains one alphabetically arranged list of articles and commodities, and, in three parallel columns, the class ratings given the articles

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and commodities by the three classifications are stated for less-than-carload and for carload shipments. The unification of the rules and regulations and the publication of the three classifications in one volume have been a convenience and a benefit to both carriers and shippers. Moreover, the effort of the United States Railroad Administration to unify the three freight classifications started a movement by which a greater degree of uniformity in the classifications is being steadily evolved. A Consolidated Freight Classification Committee, composed of the chairmen of the three classification committees, prepared the Consolidated Freight Classification that was issued to become effective December 30, 1919, while the railroads were being operated by the Railroad Administration. Since 1919, the Consolidated Freight Classification Committee has been active, and each year a large number of differences in the three classifications are removed or lessened.

The action taken by the three classification committees and by the Consolidated Freight Classification Committee is subject to the authority of the Interstate Commerce Commission which has jurisdiction over freight classification as well as over freight rates. The following statement concerning the activities of the Classification Committees, the procedure they follow, and the control of the Interstate Commerce Commission over their procedure and the classification of freight resulting therefrom may be quoted:<sup>3</sup>

The scope of the work of the Classification Committees is not confined to articles moved at class rates. The tariffs of exceptions to the classification and commodity tariffs published by individual carriers or jointly by "agents" for several carriers are governed in whole or in part by the rules and regulations established by the Classification Committees. Changes in rules or regulations are made by the exceptions to the extent specifically mentioned in these tariffs, but if not specifically amended by the tariffs of exceptions, the Classification rules govern.

The procedure followed by the Committees in classifying articles and in formulating rules and regulations governing transportation is prescribed by the Interstate Commerce Commission. The formal hearings are public, due notice being given to all parties interested in the proceedings including the state regulatory bodies and the Interstate Commerce Commission. Dockets on which matters to be considered are entered are

<sup>3</sup> E. R. Johnson, G. G. Huebner, and G. Lloyd Wilson, *Principles of Transportation* (1928), pp. 214-215.

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prepared, and full records are kept of the evidence and arguments advanced for and against the proposals. The findings of the Committees are published in supplements or reissues of the Consolidated Freight Classification issued by the Consolidated Freight Classification Committee.

The record of proceedings in classification cases before the Committees is made from the testimony of competent witnesses and experts for the shipping public and for the carriers. The decisions of the territorial and Consolidated Classification Committees are based upon the conclusions of the majority of the members. Protests and exceptions to the findings may be made by the parties affected to the Interstate Commerce Commission. The records of the testimony and decisions of the Committees are used by the Commission for the review of the cases and for its decisions in these matters. Great weight is given to the testimony and findings of the Committees by the Interstate Commerce Commission in arriving at its conclusions.

The number of classes into which freight is grouped is different for each classification. The Official Classification has six classes, numbered from one to six, but there is an intermediate grouping between classes two and three (Rule 25) and also one between classes three and four (Rule 26) which make the number of groups eight. The Southern Classification has numbered classes one to six and four lettered classes A to D, but the Interstate Commerce Commission, in 1925, when it established a new class-rate structure for the southern territory, adopted a classification with classes numbered from one to twelve. The Western Classification has ten groups designated by numbers one to five and letters A to E. All three classifications provide for rates that are higher than first-class rates, such higher rates being multiples of first-class rates.

In working out and establishing class-rate structures for different sections of the country, since the enactment of the Transportation Act of 1920, the Interstate Commerce Commission, without making formal changes in the major freight classification, has, in effect, both extended the scope of each of the classifications and increased the number of rate groupings in them. Reference is made in the preceding paragraph to the action taken by the Commission in 1925, increasing the number of classes in the Southern Classification. When the Commission, in 1931, established a revised class-rate structure in Official Classification

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territory and in the territory between Chicago and St. Louis on the east and the Rocky Mountains on the west, served by the Western Trunk Lines, it did not change the eight groupings in the Official Classification nor the ten classes in the Western Classification. However, the Commission not only fixed the percentage relationship of the rates in the lower classes to the first-class rates, but it also prescribed that for the future the class-rate tariffs of the carriers should embrace 23 scales of rates, the 22 scales below the first class to bear the percentage relationship to the first class established by the Commission in its orders. The Southwestern Lines, which serve the territory south of St. Louis and Kansas City and between the Mississippi River and the Rocky Mountains, have class rates based upon the Western Classification in which there are 10 classes, but the class-rate structure prescribed by the Commission has a 26-rate scale, three more scales than do the similar structures in the Official Classification and Western Trunk Line territories. These three additional scales that have been established for the Southwestern Lines carry the rates based upon the Western Classification to an especially low level, the lowest rate being only  $8\frac{1}{2}$  per cent of the first-class charge, as compared with a minimum of 13 per cent in the scales applying upon the railroads in the Official Classification and the Western Trunk Line territories.

The effects of the action of the Commission, in promulgating the rate scales just described, were both to prescribe rates intermediate between those applying to the several classes, and also to carry to a lower level rates based upon, or bearing a percentage relation to, first-class rates; and thus in effect to apply class rates to a large number of commodities that had previously been accorded ex-class or commodity rates. Class rates were applied to a wider range of traffic, without making a formal change in the freight classifications. The desirability of bringing as large a share as possible of railroad freight traffic within the classifications and of minimizing the number of commodities given individual, ex-class rates is manifest, and the Commission has done a valuable service in widening the scope of freight classifications and of rates based thereon.

It seemed a few years ago that the goal to be attained in the

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development of railroad freight classification would be reached when the three major classifications had been merged into one, and the making of freight rates had been systematized and stabilized by working out for each of the natural traffic territories of the country rate structures based upon the unified classification and made applicable to all but a few commodities shipped in bulk and in such large units as to require and merit exceptionally low commodity rates. Since given real authority over railroad rates in 1910, and especially since the further increase in its jurisdiction made by the Transportation Act of 1920, the Interstate Commerce Commission has devoted continuous effort to improving the classification of freight and to working out and putting into effect in the several logical subdivisions of the country carefully prepared class-rate structures whose main features were determined by the industrial and transportation conditions found upon thorough investigation to be controlling in the several parts of the country. However, while the Commission has been doing this most commendable work, transportation conditions have been so greatly changed by the rapid development of the motor carriage of freight upon a large and ever-increasing mileage of high-grade public highways that it seems probable that the existing railroad freight classifications and the rate structures based upon them will need to be changed, if not reconstructed. While the railroads were the sole carriers by land of freight, other than that hauled locally for short distances, the railroad freight classifications and rate structures that have been and are being developed were well adapted to the needs of the carriers and to the demands of the shippers; but, with the services of transportation by land divided between the competitive and complementary carriers by railroad and by highway, it is obvious that changes need to be made in the services rendered by the railroads, and probably in both the basis of their charges and in the structure of their rate systems.

Just what change should be made in railroad freight classification and class rates to meet the situation created by the large and rapidly increasing use of motor-truck by common, contract, and, especially, by private carriers is a question that is receiving much attention, but is one concerning which no very definite conclusion



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has been reached by the carriers, shippers, and government authorities. In general, it seems evident that the simplification of railroad freight classification and rate structures will be needed to establish the desirable relationship between the rate bases and the rate systems of the railroads and the freight classification and rate structures that may be worked out by motor carriers under government regulation.

The two factors given most weight in classifying railroad freight have been the value of the service to the shipper and the cost of service to the carrier, with the result that commodities whose cost of transportation per weight and bulk may be but slightly different may be assigned to widely different classes because one commodity may have a high value and thus may bear a rate payable by goods in a high class, while another commodity may be of low value per weight and bulk and be able to bear only the rate assigned to a low class of freight. While as yet but few of the motor carriers have by their own action classified their freight, they have all fixed their charges mainly with regard to the cost of performing their services.

A few states have prescribed freight classifications to be observed by common carriers by motor-trucks. The authority of each state is over only intrastate traffic. As will be explained in discussing the government regulation of motor transportation (Chapter XXI), some states have worked out and prescribed a special classification of motor freight different from the railroad freight classification, but the practice of other states has been to apply the prevailing railroad freight classification to motor carriers, motor freight being assigned to classes one to three or one to four and to groupings above first class. There is good reason for thinking that, as the classification of motor freight is worked out and put into force under government regulation, articles will be grouped into classes with reference to the relative costs of transporting them. It is possible that eventually a single freight classification for both railroad and motor carriers may be worked out by them and the state and Federal authorities. If this could be done the two kinds of carriers could compete with each other upon a more equitable basis; but there is little prospect of the early realization of this ideal.

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Will it be to the advantage of the railroads to revise radically their classification of freight and to make cost of service the major, and possibly the sole, determinant of the class to which a given commodity or article shall be assigned? In view of the fact that the larger share of the tonnage of freight moved by the railroads consists of bulky commodities of low value per unit of weight and measurement upon which the rates must be such as will yield revenues relatively near the cost of service, it is necessary that articles of higher value per weight and size shall be assessed transportation rates determined not only by the cost of service but also by considering the value of the service to the shippers or traders served. Value of service must be regarded as a definite and permanent determinant of the classes to which different kinds of railroad freight shall be assigned. Should it be made the sole or the major determinant, and should the factor of cost be eliminated?

The question just raised was given careful study by the Section of Transportation Service of the staff of the Coördinator of Transportation and the conclusions reached by Mr. J. R. Turney, the Director of the Section, and his coinvestigators were that:

Modern conditions require that all commodities be classified objectively into a limited number of groups, according to their nature, utility and nature of processing, and that such groups be rated solely with respect to their potentialities to produce the maximum volume of profitable traffic excluding consideration of cost characteristics.<sup>4</sup>

The scheme of railroad freight classification outlined by Mr. Turney and his collaborators is described as follows:<sup>5</sup>

It is suggested in the classification processes that all cost elements be eliminated and the value of the service element alone be considered; that all commodities first be classified into primary groups upon the basis of utility in order to prevent discrimination between commodities having a similar use, and to effect reasonable opportunity to mix homogeneous things, and then that these primary groups be collected into a limited number of general rating groups substantially in accordance with the stage of processing reached in the transition from rough materials to luxuries or accessories. Each of the general rating groups, and

<sup>4</sup> *Freight Traffic Report* (1935), Section of Transportation Service, Federal Coördinator of Transportation, Vol. I, p. 11.

<sup>5</sup> *Ibid.*, pp. 33-34.

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such of the primary groups as require it, should be separately rated so that the maximum volume of profitable traffic will be attracted, no traffic repelled by excessive rates, none handled at an actual loss; and that the aggregate traffic, when weighted by volume, will produce revenues sufficient to make the carrier operations profitable.

In connection with this general plan of freight classification, it is also suggested that:

The present system of freight transport charges should be reorganized to meet conditions, which have resulted from the ability of the shipper to provide his own transportation [and that]

The present carlot sales unit and minimum weight requirement are no longer adapted to commercial needs, are conducive to uneconomical loading, and tend to divert cargo shipments from the railways. The price scale should vary with the size of the shipment, from a ton to a train load, permitting shipments in any amount, but creating an incentive for full instead of minimum loading.

In submitting the report, containing the foregoing suggestions, to the carriers' Regional Coördinating Committees for them to consider and report upon, the Coördinator of Transportation did not commit himself as definitely favoring the adoption of the suggestions by the carriers, but stated that the matters dealt with were of such vast scope and importance as to cause him and his staff to be justified in withholding their recommendations until the data in the report had "been reviewed by others," that is, by the carriers and by the shippers. The Coördinator did, however, express "the conviction that modern commercial needs and competitive transportation conditions imperatively demand a thorough reëxamination of the operating methods of the railroads, of their service and equipment, and of their rate structure." An examination of rate structures would obviously include the freight classification upon which the rate structures are based.

A general revision of railroad freight classification and the concurrent readjustment of class rates will doubtless follow in due season from the study now being given the problems connected therewith by railroad committees, by shippers' organizations, by the state regulatory commissions, and especially by the Interstate Commerce Commission which now has jurisdiction over the classification of the interstate freight not only of the rail-

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roads but also of the motor carriers. The exercise of jurisdiction will involve the responsibility of bringing about such coördination or harmony of rail and truck freight classifications as will best serve the interests of both kinds of carriers. The larger organizations, both of railway carriers and motor carriers, whose purpose must needs be to further the orderly development of highway and railroad transportation under the intelligent and constructive regulation of state and Federal authorities, can be of great assistance in solving the pending problems of freight classification.

### THE BASES OF RAILROAD FREIGHT RATES

The policy to be followed in the government regulation of railroad freight rates will necessarily take into account the factors controlling or affecting such charges when they are not regulated or determined by the Government. The Government cannot ignore the operation of economic forces in controlling prices, whether of transportation services or of the products of industry. This is true not only of the government regulation of transportation and industry under private ownership and management, but also of socialistic ownership and operation; for even when the Government is owner and manager it must coöperate with economic forces if the goal of social welfare is to be attained.

Railroad rates, as has often been stated, when fixed by the carriers and when regulated by the Government, are determined primarily by the consideration of three general factors and by the relative weight given the several factors in deciding what actual rates shall be charged. The three factors are the cost to the carriers of performing the service, the value of the service to the shippers, to the industry, or the locality served, and the high or low value, per unit of weight and bulk, of the commodity transported. In classifying freight and thus in determining the relative rates that articles of different kinds and values shall be charged, these factors are the major determinants.

The simplified rule of rate-making embodied in the Emergency Transportation Act of 1933 directs the Interstate Commerce Com-

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mission, in prescribing just and reasonable rates, to "give due consideration, among other factors, to the effect of rates on the movement of traffic," which is in reality a mandate to consider the value of commodities seeking transportation and the value to the shippers of the services desired. The same brief rule requires the Commission to consider "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service," that is, to fix rates that will in the aggregate yield revenues that are enough more than the costs of service to enable the carriers to serve the public adequately and efficiently.

The minimum level of railroad rates, in general and over a period of time, must be such as to cover the costs of service as a whole—fixed charges and current expenses. Some individual rates may temporarily need to be below that level; and, during a business depression, general economic conditions may force railroad traffic, rates, and revenues below the cost-of-service level, making necessary a scale of rates definitely above the cost of service during years of business prosperity. The value of the service fixes for each possible shipment the upper limit of the rate that may be charged. Under normal business conditions, actual railroad rates will be fixed by the railroads in their competition with each other and with other carriers, and will be established by public authority, somewhere between the minima fixed by the costs of service and the maxima determined by the value of service—the rate-making policy of both the carriers and the regulating commissions being subject to the general and higher power of economic conditions and forces.

As was stated in the preceding chapter, Congress, in the Transportation Act of 1920, directed the Interstate Commerce Commission so to adjust and fix railroad rates as to enable the carriers in the aggregate to earn a fair annual return upon the value of their property used in performing their services of transportation. This mandate, as was explained, could not be carried out by the Commission which was compelled to fix, or allow the railroad carriers to charge, such rates as were found to be reasonable under changing economic conditions, and such rates as it was

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possible or desirable for the railroads to charge when decreasing traffic intensified inter-railway competition and when the rapid development of motor transportation was diverting from the railroads an increasing tonnage that would otherwise have moved on the rails. This unsuccessful rule of rate-making was intended to place railroad charges, in the aggregate, upon a cost-of-service basis, the costs to be included being the operating and maintenance expenses of the railroads in the aggregate, their improvements properly chargeable to income, and a fair annual return on the value (as determined by the Commission) of their property "held for and used in the service of transportation." The failure of this rule of rate-making, however, did not settle the question whether cost of service is a possible, and, if so, a desirable basis of railroad charges.

Cost of service as the basis of railroad rates has been given especial attention in recent discussions. If the rates of carriers by rail and of common and contract carriers upon the highways and waterways were regulated in like measure and with equal effectiveness, the influence of intercarrier competition upon rates could be minimized, although probably nothing short of government ownership and operation of transportation facilities would completely eliminate the competition of rival agencies as a factor affecting service charges. The exclusion or minimizing of competition as a factor affecting railroad rates would remove one of the obstacles to making the cost of service the basis of charges.

By the Emergency Transportation Act of 1933, Section 13, the Coördinator of Transportation was directed to investigate and make recommendations concerning a number of subjects, one of them being "cost-finding in rail transportation." A Cost-finding Section was organized by the Coördinator and put in charge of an experienced cost-finding accountant. The Section worked out a detailed plan and method by which "each item of expense is apportioned to the various service units," and from four railroad systems information for the year 1932 was obtained to use in testing the plan. What changes, if any, in methods of railroad accounting will result from the work done by the Cost-finding Section remains to be determined. The Coördinator in his pre-

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liminary official report<sup>6</sup> and in subsequent public addresses has shown that it would be helpful to the railroads in the simplification of their rate structures and in meeting the competition of motor carriers if more emphasis were placed upon cost of service in making rates, but he has not committed himself as favoring that as the sole basis. On the other hand, Mr. J. R. Turney, who was for two years the Director of the Section of Transportation Service of the staff of the Coördinator, expresses the opinion, in his instructive *Freight Traffic Report* that was submitted to the Coördinator in 1935, that:

Insofar as the determination of the basic carrier level [of railroad freight rates] of the country as a whole or of an individual rate territory is concerned, costing can be made a relatively simple process.

This opinion is also accompanied by the statement that:

These [rate] levels should be based purely on costs for several important reasons: To insure profitable operation; to avoid competitive or cutthroat rate-making; to eliminate all possibility of market preference or discrimination; and to avoid litigation from rate-making.

Although the above opinion is expressed by a man who has occupied an important position in the railroad service and who has made a thorough investigation of freight traffic problems, it would seem that the difficulties involved in making cost of service the sole basis of railroad charges have been unduly minimized. The experience of those who make railroad rates and of the government commissions that regulate rates does not seem to support the conclusion reached by Mr. Turney; but it is quite certain that in the future development of railroad rate structures there will be greater weight given to the cost-of-service factor in order to bring about a desirable adjustment of railroad charges to those of carriers upon the highways whose freight classification and rates will be determined mainly by the cost of services rendered.

<sup>6</sup> Regulation of Railroads, Senate Document No. 119, 73rd Congress, 2nd Session, pp. 65-67. This report was submitted to the Interstate Commerce Commission by which it was transmitted to Congress, Jan. 20, 1934.

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## STANDARDIZATION OF RAILROAD FREIGHT RATES

### BY GOVERNMENT REGULATION

Prior to the adoption of the Mann-Elkins Act of 1910, the Interstate Commerce Commission had authority to adjust railroad rates only upon the filing of complaints by shippers. The Act of 1910 gave the Commission power to act upon its own motion in investigating rates and making changes in them; and the Commission was also authorized to suspend the rates proposed by the carriers until the Commission had decided whether the tariffs should or should not be allowed to go into effect. This enabled the Commission to undertake comprehensive rate investigations and to begin the development of general rate structures in the several rate territories into which the country as a whole is divided. When the Act of 1910 was adopted, cases involving the westbound and eastbound transcontinental rates were before the Commission, and by means of a series of decisions over a period of years the main features of the present scheme of transcontinental freight rates were worked out. The rates on railroad express traffic, then in charge of companies independent of the railroads, were investigated and the country-wide "block system" of express rates that has since been in force was established. The Commission also investigated and revised the railroad rates in the south, the territory of the Southern Freight Classification; and the long-prevailing "basing-point" system of rates, which caused the long-and-short-haul principle of the fourth section of the Interstate Commerce Act to be extensively violated, was supplanted by a rate structure in which, so far as possible, charges were made to vary with distance or length of haul.

While these and other activities of the Commission to standardize railroad freight rates were in progress, the United States became involved in the World War, and in consequence the railroads for a period of 26 months were operated by the Federal Government. No important changes in railroad rate systems were attempted during the period of government operation; and the effort that was made to consolidate the three major freight classifications was unsuccessful. The conditions were not favorable to general changes in railroad rate structures. Government operation



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was to be temporary and its purpose was to meet the situation created by the war. However, the need of changes in railroad rate systems was realized. As Dr. Wilson states in his brochure upon *The Principles of Freight Traffic*, "The revision of the class rate structure in order to evolve a definite and uniform rate basis dates back to 1918 when the Eastern Freight Traffic Committee made a comprehensive study and reported to the United States Railroad Administration. In 1919, the Interstate Commerce Commission commented upon the 'hodgepodge' presented in eastern rates."

By the Transportation Act of 1920, by which the railroads were returned to their owners for operation, the Commission's authority over railroad rates was enlarged and made more definite and its responsibility for such constructive regulation of railroad charges as would assure the development and maintenance of an adequate system of railroad transportation was increased. Inasmuch as the traffic, revenues, and credit of the railroads as a whole and in the several sections of the country improved during the decade following the close of the World War, conditions were favorable for the resumption by the Commission of the work it had begun, in pre-war years, of revising and standardizing railroad rate structures. The class rates in southern territory and rates in New England and in the Central Freight Association territory were investigated and an appropriate rate structure was established in each section. The investigation of railroad rates in the Eastern Trunk Line, the Southwestern, and Western Trunk Line territories followed and, by the end of 1931, new rate systems had been promulgated in those three sections. Meanwhile changes had been made in the rates to and from the Pacific coast territory and the two rate structures—that in the Pacific northwest and that in the Pacific southwest territories—had been given their present characteristics.

As has been stated, it is not the purpose of this discussion to describe the rate structures that have been developed and are now in effect in the rate territories into which the railroads of the United States have been grouped for rate-making purposes. Such a description would take this discussion too far afield, and has been rendered unnecessary by the work of other students of

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railroad rate-making.<sup>7</sup> It is the policy followed by the Interstate Commerce Commission, and the principles by which it has been guided, in the standardization of freight rates and rate structures with which we are here concerned.

The first task confronting the Commission under the Transportation Act of 1920 was to make the necessary general increase in the rates and revenues of the carriers; and this was done by raising the passenger fares and the freight rates, both interstate and intrastate, of all railroads. The same level of higher passenger fares was established for the entire country, while freight rates were increased by somewhat different percentages in the four rate-making territories into which the country was divided by the Commission. The state authorities contested the authority of the Interstate Commerce Commission to exercise jurisdiction over state-made intrastate rates; but, as has been stated, the Supreme Court, in the Wisconsin and New York rate cases, decided in 1922, upheld the action of the Commission.

The rate-making and rate-adjustment problems that came before the Commission under the Act of 1920 soon made apparent, not only to the Commission but also to the carriers and shippers, the need of revising and systematizing both class and commodity rates, which were complicated and resulted in many unjust discriminations between commodities and localities. Accordingly the Commission, in 1922, began the investigation of, "interstate class rates in southern territory; between that territory and Mississippi River Crossings, Ohio River Crossings and points beyond in Illinois, Buffalo, Pittsburgh, and central territories; and between southern territory and Virginia cities and eastern points beyond in trunk line and New England territories." After prolonged hearings and an original <sup>8</sup> and a modified <sup>9</sup> decision by the Commission, new interstate class rates were established to apply within the Southern Classification territory and between that

<sup>7</sup> Consult the publications previously referred to, *The Principles of Freight Traffic*, by G. Lloyd Wilson, *The Merchandise Traffic Report*, by J. R. Turney and his collaborators, and the annual publication, *The Freight Traffic Red Book*.

<sup>8</sup> 100 I.C.C. 513.

<sup>9</sup> 109 I.C.C. 300.

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territory and the Official Classification territory on the north, the interterritorial rates including those partly by water as well as those by all-rail routes.

While the carriers were engaged in working out the new tariffs embodying these new rates for the southern territory, Congress adopted the Hoch-Smith Resolution, approved January 30, 1925, directing the Commission "to make a thorough investigation of the rate structure of common carriers subject to the Interstate Commerce Act," and the Commission, by action taken March 12, 1925, began the Rate Structure Investigation that was carried on for several years and covered class-rate structures and numerous commodity rates. One purpose of the Commission, in its resolution inaugurating the investigation, was to "make in the progress of the investigation such decisions and orders as the Commission may find necessary or appropriate upon the record then made in order to place the rates upon a just and reasonable basis with relation to other rates."<sup>10</sup>

In 1925, the Commission had under consideration "the class-rate structure and, with certain exceptions, the commodity rates in the Southwest." An investigation of these rates had been begun in 1922. Cases involving these rates were subsequently brought before the Commission, which, in 1927, prescribed a new rate structure for the territory of the southwestern lines, and this structure after several modifications was put into effect in 1929. Changes have also been made since then.

An investigation of class rates in Official Classification territory was begun in 1925; and, in the following year, the Western Trunk Line class-rate investigation was started. New class-rate structures resulted and were ordered in force by the Commission in December, 1931.<sup>11</sup> Since that date, the Commission has made such alterations in the rates as changing economic conditions seemed to require. To some extent the bases and details of the rate structures have been modified and their dissimilarities reduced.

<sup>10</sup> Annual Report of the Interstate Commerce Commission for 1925, p. 39.

<sup>11</sup> The original decision and order as to the Western Trunk Line rates is reported in 164 I.C.C. 1; that as to rates in Official Classification territory in the same volume at p. 314.

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The objects which the Commission sought to accomplish by the foregoing rate investigations were stated as follows by the Commission in its Annual Report for 1926 (p. 41) :

The various proceedings, it will be seen, cover the class-rate structure in a great part of the entire country. It is our hope that they will result in a structure simpler and more consistent than that which now exists and that they will pave the way for the revision of commodity rates. We also hope they will have the effect of materially reducing the number of rate complaints upon which we must act. A prolific source of such complaints in the past has been the apparent discriminations between competing shippers and localities often created by absence in the rate structure of anything resembling uniformity and design. It is our further expectation that the groundwork so laid will facilitate the consideration of the entire rate structure, both class and commodity, in the light of the Hoch-Smith resolution with a view to establishing proper relations in rate levels between the various articles of commerce.

The realization of the Commission's aims and hopes as stated in 1926 was made more difficult by the changes in railroad rates made necessary both by the business depression that followed 1929 and by the competition which the railroad had with motor carriers whose traffic increased rapidly and whose rates and services were subject to only such incomplete and largely ineffective government regulation as was carried out by the states. However, the necessity of adopting measures of expediency to enable the railroads to meet with less difficulty business and transportation situations, that presumably must be temporary, did not divert the Commission from seeking to accomplish its fivefold aim of causing railroad class and commodity rates to be made according to a definite plan, of simplifying them, of minimizing preventable unjust discriminations, of placing competing carriers and rival communities upon a definite and equitable basis of competition, and of facilitating the government regulation of railroad rates both by the Federal Government and by the states.

As regards the method of procedure to be followed in bringing about the desired standardization of railroad rates, the Commission has found by experience that it is not wise to try to remodel all rates, class and commodity, at one time, as was contemplated by the Hoch-Smith Resolution, and as was, in effect, attempted by the Commission in obeying the mandate of that

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congressional act. In its 1933 Annual Report, the Commission states that, "Experience has shown that necessary changes in the rate structure can be effected by us with the least delay [which is the mandate of the Hoch-Smith Resolution] through the usual course of hearing complaints, or by investigations upon our own motion, rather than under a general nation-wide investigation which is likely to assume unduly ponderous proportions." In 1934, the Federal Coördinator of Transportation and the Interstate Commerce Commission recommended the repeal of the Hoch-Smith Resolution. Congress did not do so, but its failure to act was not important, because the Commission soon brought to a conclusion most of the numerous investigations that were made to fulfil the supposed requirements of the resolution.

In carrying out a policy of standardizing railroad freight rates at least two questions arise concerning which there are differences of opinion. One question is, to what extent should distance or length of haul be a controlling factor in fixing the rates embodied in class and commodity rate scales? The tendency of regulatory commissions is to favor distance rate scales, that is, tapering rate scales in which the rate per ton per mile decreases with increase in distance. In its decision establishing interstate class rates in southern territory the Commission found that such rates "should be based upon a distance scale or scales sufficiently extended so that hauls of all lengths will be covered."

The adoption of distance rate scales, it is claimed by their advocates, facilitates the stabilization of rates. They also argue that discriminations due to competitive influences can be minimized, rates in different territories can be put upon a common basis, intrastate and interstate rates can be better harmonized, the cost of service can be made the major basis of railroad charges, and that such rates are easily understood.

Distance rate scales, however, are not favored by all carriers and are opposed by many shippers who prefer to have transportation charges determined mainly by competition. Inter-carrier competition will often give the less favored lines more traffic and will give some producers and communities more favorable railroad rates than they will secure if standard distance rate scales are generally in force. Distance rate scales, it is asserted,

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further the zoning of traffic and production and limit the shipment of products to distant markets; they tend to favor the railroads having the most direct line and shortest haul and to handicap railroads having a less direct line and a longer haul. Moreover, because of the fact that distance rate scales emphasize the cost of service, they are not favored by those who would make value of service the main criterion of reasonableness.

While the arguments on each side of this controversial question have weight, it is probable that larger emphasis will, from now on, be placed upon cost of service in making railroad rates and that distance will be a factor of increasing importance. The Coördinator of Transportation stated that railroad rates must be more definitely fixed by cost of service, his view being:

That existing railroad rates are highly complex and based on meticulous differentiations between forms of traffic which reflect so-called "value of the service" as well as costs; that this system of rates developed when the railroads had a practical monopoly of much traffic which they do not now have; and that many of these rates are not well suited to present competitive conditions.<sup>12</sup>

The competitive conditions referred to by the Coördinator are particularly those created by the competition of the railroads with the motor carriers whose rates are determined mainly by costs and with the trucks used by the owners in their own business when and to the extent that such use will reduce transportation costs. The shifting of railroad rates more definitely to a cost basis will give distance a more controlling influence upon rate structure.

The conclusion reached by Mr. J. R. Turney as the result of a thorough investigation of railroad freight traffic and rates was that in the "modernization" of rates the objective will be "charges for shipments of the same commodity [that] will vary with the characteristics which affect the carrier service and cost required, i. e., the weight, the volume, and the distance." This opinion seems to be in accord with the trend of regulatory practice and with the policy being followed by the railroads in the changes they are making in their rate structures to adapt their charges

<sup>12</sup> Report of the Federal Coördinator of Transportation, 1934, House Document No. 89, 74th Congress, 1st Session, pp. 6-7.

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to the conditions of competition created by the enlarging use of motor trucks by common and private carriers.

The other outstanding question that has arisen in connection with the growing standardization of railroad rates by government regulation is whether there should continue to be separate and differing rate structures for each of the several rate territories into which the United States is divided, or whether the same class and commodity rate structures should apply to railroad traffic throughout the entire country? On this question, the conclusion expressed by Mr. Turney and his collaborators in their Freight Traffic Report is very definite. After naming the nine rate territories, and the seven freight bureaus or associations through which the railroads act jointly in making through and competitive rates, the Report states that:

These rate territories were originally marked by the limits of the carriers embraced therein. As the commerce of the nation integrated and consolidation of the carriers proceeded, those limits have become more and more artificial. Overlapping of carriers in more than one rate territory is the rule rather than the exception. On the average, each carrier operates in two such territories, some in as many as four. . . . Over 55 per cent of rail revenues are derived from interterritorial traffic. . . .

Although the rate structure of the several territories still reflects some of the conditions under which the several carrier groups were originally constituted, the results achieved are almost identical with respect both to the distribution of traffic and as to the unit revenues of the various commodity groups. . . .

The need for economic parity among territories, for removal of the influence of market competition, for elimination of discriminations against cities and communities, and for simplification, points to the conclusion that a uniform price system applying through the country is worthy of the most careful consideration.<sup>13</sup>

The most significant statement contained in the foregoing opinion is that "the results achieved [by the different rate structures in the several rate territories] are almost identical with respect both to the distribution of traffic [presumably among classes and commodity groups] and as to the unit revenues of the various commodity groups." If this be an accurate generalization, it would seem that as the carriers coöperate more fully in rate-

<sup>13</sup> *Ibid.*, pp. 68, 69.

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making and as government regulation broadens and becomes increasingly constructive in aim and method, the several territorial rate structures can be and will be made more and more alike until they are merged into country-wide and standardized class and commodity structures. Whether this shall prove to be more than the expression of an ideal or a hope only time and experience can determine. Presumably the goal cannot be reached quickly, but will be approached slowly as one change after another is made in revising existing rate structures and adapting them to the needs of carriers and shippers. Moreover, as these changes are made in particular railroad charges and in rate structures, one necessary consideration will be the better adjustment of the rates of carriers by rail and by highway. Is it too much to expect that the result attained will be a standardized system of transportation rates for rail, motor, and water carriers, the rates applicable to the three agencies of transportation being so adjusted as to systematize and stabilize the charges of all? Indeed, we are working toward a co-ordinated system of transportation by rail, highway, water, and air. Are we not also called upon to evolve a coördinated system of transportation charges?

### SOME MAJOR PROBLEMS OF GOVERNMENT REGULATION OF RAILROAD FREIGHT RATES

In the government regulation of railroad freight rates in the United States some problems that were inherent in the very nature of the task were present at the beginning and have persisted ever since, while others have arisen as regulation has been broadened in scope and as changes have taken place in economic conditions and in the competition of railroads with each other and with motor carriers. In general the major task of government regulation of railroad freight rates, for the present and for the near future, is the one that has been discussed in the preceding sections of this chapter, that is, the task of placing the charges on what is decided to be the right basis and of standardizing class and commodity rate structures, either for each of the present rate-making territories or for application to the entire country, as further experience and investigation may prove to be the



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wiser policy. In addition to this general task, there are, among several special problems of rate regulation, some of much past and present significance. Five of them may well be briefly considered.

As trunk-line railroads were built westward and the North Atlantic seaboard cities, Boston to Norfolk, were connected with the Middle West, the competition of the railroads became keen and its intensity was heightened by the trade rivalry of the cities. Inter-carrier competition became destructive warfare which the carriers sought to restrict by arbitration and by agreements as to minimum rates east- and westbound between the Middle West and the section east of Buffalo, Pittsburgh, and Wheeling. Thus in 1877, 10 years before the enactment of the Interstate Commerce Act, two characteristic features of the rate structures in the Eastern Trunk Line territory had their origin—the “percentage” rate system and the “eastern seaboard differentials.” Briefly stated, the rates from New York to Chicago and from Chicago to New York were made the base rates, and the section between Pittsburgh and the Mississippi River was divided into irregularly concentric rate zones, the rates from the points in each zone from and to New York being a percentage of the base rates between Chicago and New York. At the beginning, the rates between New York and Pittsburgh were 60 per cent of the New York-Chicago rates, each successive zone west from Pittsburgh having a higher percentage of the New York-Chicago base. Indianapolis, for example, and the points in its zone or rate group had rates to New York 93 per cent of the New York-Chicago bases; while Peoria, Illinois, and its zone had 110 per cent of the basic rates. The rates to and from the seaboard cities other than New York were differentials above or below the New York rates. On import and export traffic between Boston and the Middle West, Boston’s rates were on the New York level while for corresponding domestic traffic Boston had differentials above New York; Philadelphia had rates lower than New York by fixed differentials; Baltimore’s differentials under New York were somewhat greater than those of Philadelphia; while Norfolk was, in general, upon the Baltimore basis.

It is not necessary in this discussion to go into the details as to

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the original adjustment of the percentage scale of rates and of the seaboard differential, nor need the successive readjustments be considered. The rate adjustments as among the carriers and as among the rival seaboard cities were compromises by which the interested parties sought to keep competition within tolerable limits. The seaboard differentials were not satisfactory to New York which maintained that rates between New York and the West ought not to be higher than the rates applying at Philadelphia and Baltimore; Boston contended that her rates to and from the West ought not to be higher than New York and that on exports and imports her rates should be those of Baltimore; while Philadelphia objected to a lower rate level at Baltimore. The New York interests brought several cases before the Interstate Commerce Commission to have the seaboard differentials abolished while Boston, and latterly Albany, New York, have sought to bring about adjustments. In general, the Interstate Commerce Commission upheld the seaboard differentials with only modifications in detail, until in 1931 when the revised eastern trunk-line class rates were put into effect. By this revision rates from and to the several seaboard cities were fixed by rate scales that were applied to all points with such modifications as were necessary to meet particular situations. In general, however, the application of the rate scales to domestic traffic has not greatly changed the previous differential adjustment of import and export rates as among the North Atlantic seaboard cities; nor has the Commission finally disposed of the problems connected with the adjustment of rates between the rival North Atlantic industrial and commercial centers and the interior of the country.

Another persistent problem that has required much investigation and several decisions by the Interstate Commerce Commission has been the adjustment of railroad rates on exports and imports via the ports of rival seaboards, the Atlantic, Gulf, and Pacific seaboards of the United States. The railroad lines connecting the Middle West with Gulf ports and the commercial cities on the Gulf Coast naturally sought to obtain as much as possible of the exports and imports of the rapidly developing Mississippi Valley. This brought the railroads to the Gulf and the ports served by them into competition with the east and west

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trunk-line railroads and the Atlantic ports served by them. Somewhat later, as the commerce of the United States with the Orient increased and the Pacific Coast ports grew in commercial importance, the railroads connecting those ports with the Middle West made such rates on imports and exports as would place the Pacific Coast ports on a parity with Atlantic gateways in competing for the trade with trans-Pacific countries.

To enable the exports of the products of the Middle West to move via the Gulf ports, the railroads to New Orleans and other Gulf gateways made the rates on such products much lower than on like commodities for domestic markets. "In general, the export rail rates from the central part of the country to the South Atlantic and Gulf ports were the same as the domestic rates to New York," while "the rates on domestic traffic to New Orleans and other southern ports were much higher than rates on like traffic to New York, being in some instances a third higher."<sup>14</sup> The general adjustment of *export* rates via Gulf and Atlantic ports was approved by the Director-General of Railroads in 1919 and was later continued, with modifications, by the Interstate Commerce Commission. After a long controversy the railroad lines to the Gulf and Atlantic ports, in 1907, submitted the adjustment of rates on imports to arbitration, and by the award of the arbitrators the rail rates on *imports* via the Gulf ports were made lower than the rates via New York and other North Atlantic ports by fixed differentials ranging from 18 cents per 100 pounds on first and second classes to six cents per 100 pounds on the sixth class and on goods taking rates lower than those of the sixth class.

The foregoing and later adjustments of the rates on export and import traffic became increasingly unsatisfactory to all parties concerned, especially to the eastern trunk lines and to the commercial interests served by them. Moreover, the rates proposed by

<sup>14</sup> *Transportation by Water* (1935), by E. R. Johnson, G. G. Huebner, and A. K. Henry, p. 424. Consult Chap. xxvi of this volume for a discussion of "Import and Export Railroad Rates at United States Ports," and for references to decisions of the Interstate Commerce Commission; to a report upon "Preferential Transportation Rates and their Relation to Import and Export Trade of the United States" made to the United States Tariff Commission in 1922 by E. R. Johnson and G. G. Huebner; and to other sources of information.

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the southern lines violated the long-and-short-haul section of the Interstate Commerce Act and were suspended by the Commission pending its decisions as to the merits of the proposed changes and as to its relieving the carriers of the requirements of the long-and-short-haul section. The Commission, in 1930, rendered a decision that was generally favorable to the southern lines, but its order putting the authorized rates in force was suspended while further hearings were held by the Commission. In the meantime, the Commission established the new eastern class rates by order effective January 3, 1932, and the changes thereby made affected somewhat the relation of the rates of the eastern trunk lines and of the southern lines. The Commission brought the controversy over the adjustment of the import and export rail rates by North Atlantic, South Atlantic, and Gulf ports to an end, at least for a time, by a decision rendered December 3, 1934, effective January 3, 1935. By this decision the Commission made several changes in the rates that would have gone into effect had the order in the decision of 1930 not been suspended; but, with the exception of these modifications, the Commission found that "the suspended rates to which the southern lines are respondents have been justified" and "that the suspended schedules to which the eastern lines are respondents have not been justified."<sup>15</sup> If what has taken place in the past is indicative of what will transpire in the future, it is probable that the relative railroad rates, via the competing seaboards on import and export traffic, will yet again be subject to investigation and adjustment by the Interstate Commerce Commission.

The Hoch-Smith Resolution, approved January 30, 1925, and the elaborate rate investigations made by the Commission in seeking to carry out the mandate of Congress have been referred to. The purpose of Congress in adopting this resolution was to bring about lower railroad rates on the products of agriculture, the market prices of which had been falling while the prices of the products of other industries were not falling or were rising. The Commission, in adjusting railroad rates, was to take into consideration, "so far as it is legally possible to do so," the con-

<sup>15</sup> Export and Import Rates To and From Southern Ports, 205 I.C.C. 511 (at p. 555).

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ditions prevailing in the several industries, and was "to give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities," and was "in view of the existing depression in agriculture . . . to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement of the products of agriculture . . . including livestock, at the lowest possible rates compatible with the maintenance of adequate transportation service."

Did this Resolution effect a change in the basic law—the Interstate Commerce Act—and make the test of the reasonableness of rates something other than the cost of service to the carrier and a fair return upon the property devoted to the service of the public? There can be no doubt that Congress expected the Commission, in fixing rates on the products of agriculture, to test their reasonableness by considerations not applicable under the Interstate Commerce Act, and the Commission interpreted the Resolution as requiring that to be done. The question whether the Resolution, as it was worded, had in fact changed the basic Interstate Commerce Act came before the United States Supreme Court in a suit to set aside an order of the Commission condemning rates on deciduous fruits from California to points between the Mississippi and the Atlantic seaboard.<sup>16</sup> As stated in the opinion of the Court, the Commission had held in its decision and order "that the 'primary issue to be determined' was whether the existing rates were in accord with the resolution; that the resolution effected a change 'in the basic law' and that this change operated to eliminate a decision made June 25, 1925, in another proceeding between the same parties wherein the Commission found the same rates neither unreasonable nor unduly preferential, and sustained them as lawful rates." The Supreme Court held that the Resolution requires only "lawful changes" to be made in rates; and, as the Resolution does not contain a definition of lawful change, the provisions of the Interstate Commerce Act are not altered. The Resolution called upon the Commission to

<sup>16</sup> *Ann Arbor Railroad Company et al., Appts., v. U.S., Interstate Commerce Commission, and California Growers' and Shippers' Protective League*, 281 U.S. 658-669, decided June 2, 1930.

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accord agricultural products "the lowest possible rates compatible with the maintenance of adequate transportation service"; but the Court ruled that if the requirements of the Resolution "mean more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and need for maintaining an adequate transportation system they work no change in the existing law." The Court held that the Resolution had made no change in the basic law, but, if such a change had been made, it would have given "rise to a serious question respecting the constitutional validity" of the paragraph relating to the fixing of rates on the products of agriculture.

When this decision of the Supreme Court was rendered, the Commission had under way a number of rate investigations that had been undertaken to carry out the Hoch-Smith Resolution, but by 1932 it had evidently become convinced that, while the investigations in progress should be completed, the method of procedure it had adopted to execute the mandate of the Resolution was not a wise one to follow. The Commission stated in its Annual Report for 1932 that "Experience indicates that large proceedings like these should be initiated in the future only sparingly and in response to imperative needs which can be met to advantage only in that way." Accordingly, in its Report for 1933, the Commission announced that it had on October 2nd of that year issued an order discontinuing the general investigation started because of the Hoch-Smith Resolution "except for those parts of the proceeding which have been heard, or upon which testimony is being heard, and not yet submitted," and except for deciding upon orders necessarily "supplementary or ancillary" to orders that have been issued.

One of the large, difficult, and perennial problems confronting the Interstate Commerce Commission has been the administration of the fourth section—the long-and-short-haul section—of the Interstate Commerce Act. That law was enacted mainly to prevent railroad rates from being unreasonably high or unjustly discriminatory, and one kind of discrimination that was manifest and that seemed to the public to be especially unfair was a higher charge for a shorter haul than for a longer haul over the same

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line and in the same direction. Although the first three sections of the law prohibited all unreasonable discriminations among persons, places, or commodities, Congress included in the Act the fourth section forbidding a higher charge for a shorter intermediate haul than for a longer haul "under substantially similar circumstances and conditions." The law left to the carrier to decide whether the conditions and circumstances of the longer and shorter hauls were or were not substantially similar and whether the rates applying to the two hauls were subject to the prohibitions of the fourth section. The original action thus taken by the carrier in making rates could be reviewed by the Commission with which the interpretation and enforcement of the law rested.

The Commission early ruled that competition between a railroad subject to the Interstate Commerce Act and a carrier by water not regulated by the Act might create dissimilar circumstances and conditions that relieved the rail carrier from the requirements of the fourth section, while the competition of two railroads, both subject to the Act, did not create dissimilarity of conditions within the meaning of the statute. This interpretation of the fourth section by the Commission was, however, overruled, in 1897, by the United States Supreme Court in the *Troy Case* which held that the competition between rival railways might make the circumstances and conditions dissimilar and thus warrant the carriers in not observing the fourth section.<sup>17</sup> This decision practically invalidated the fourth section until it was amended in 1910 by the Mann-Elkins Act which eliminated from the section the phrase "under substantially similar circumstances and conditions" and further strengthened the section by prohibiting carriers from charging more for a shorter than for a longer haul over the same line and in the same direction, the shorter being included within the longer distance, unless, after application to the Commission, the carriers were relieved of the fourth-section requirement. This amendment of the long-and-short-haul section was followed by action of the Commission doing away with the "basing-point" system rates in the southern

<sup>17</sup> *Interstate Commerce Commission v. Alabama Midland Railway Company, et al.*, 168 U.S. 144.

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territory, and the action adjusting the relation of the rates of the transcontinental railroads applying at intermediate intermountain points and the rates on through traffic to and from Pacific Coast points. The Commission is being continuously called upon to pass judgment upon rates in many parts of the country, to decide whether or to what extent rail carriers shall be granted relief from the fourth section.

Questions connected with the enforcement of the fourth section have become of increasing importance, because of the changes made in the section by the Transportation Act of 1920, and because of the intensified competition of the intercoastal steamship lines with the railroads for the traffic between the two seaboard sections of the country. The Act of 1920 added two provisos to the fourth section that have made the section much more rigid than it previously was. The section now stipulates that:

The Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuitry, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning-line is not longer than that of the direct line or route between the competitive points.

It is logical that the Commission, in acting upon fourth-section cases, should insist that it, and not the carriers, decide what rates are "reasonably compensatory," and the result has been that the transcontinental railroad lines have not been allowed to make through rates low enough to hold traffic against the intercoastal water lines. The position taken by the transcontinental rail lines has often been that it would be to their advantage, if necessary to secure competitive traffic, to make rates for the long haul that yield revenues somewhat but not much greater than out-of-pocket expenses, thus leaving most of the fixed charges or overhead costs to be borne by the receipts from the traffic at intermediate points. The carriers also claim that this policy of rate-making does not result in higher charges at intermediate points, but may in fact make possible lower rates, because of



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the larger total tonnage handled as a result of holding the long-haul traffic to the rails. In general, this view has not been shared by the Commission which has insisted upon through rates that are *per se* reasonably compensatory and that do not unduly discriminate in favor of the competitive and against the non-competitive points.

The Commission, however, has in general sought to give the fourth section such flexibility as to prevent it from interfering with the establishment of logical and standardized rate structures. The decision reached in 1935 in the long-continued controversy regarding the railroad rates on export and import traffic from and to the Middle West via the Gulf and South Atlantic ports involved exempting carriers from the requirements of the fourth section as regards numerous rates. Likewise, the establishment of the revised class-rate structures in the several rate territories necessitated granting relief from the fourth section to some extent.

The railroad carriers, particularly those competing with the coastwise and intercoastal water lines, desire the repeal of the fourth section. They maintain that the prohibition of unreasonable discriminations in the first three sections of the Interstate Commerce Act gives the Commission ample authority to protect the public. The sentiment of shippers' organizations is divided, but the majority favor modification of the existing fourth section. The Coördinator of Transportation, in his report upon the "Regulation of Transportation Agencies"<sup>18</sup> reached the conclusion that the section should not be repealed, but "that the amendments introduced in 1920 may well be eliminated . . . and that the section should take the form which it had prior to the 1920 amendments." After holding hearings at which opposing interests presented their views, the Committee on Interstate and Foreign Commerce of the United States House of Representatives reported in July, 1935, a bill (which was again introduced in 1937) that would repeal the fourth section now in force and substitute therefore a section the gist of which was that the carriers might publish and file with the Commission lower rates for a longer than for a shorter distance over the same line and in the

<sup>18</sup> P. 72. The report was made early in 1934.

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same direction. Such rates, like other rates, would be subject to suspension by the Commission, pending an investigation as to their reasonableness and fairness, and such rates, as in the case of other rates, would be subject to complaint by interested shippers or communities. If the reasonableness of the rates should be questioned by Commission or complainant "the burden of proof shall be upon the carrier to justify the rate or charge against any claim of a violation of sections 1, 2 or 3 of this [the Interstate Commerce] Act." In reporting this bill the Committee expressed the opinion that under the present fourth section and the procedure followed in its enforcement the "railroads are handicapped and handcuffed so that they cannot avoid substantial loss of traffic to competitive forms of transportation," and that "all rates will be subject to the complete control of the Commission, if this bill is enacted, against any violation of the Interstate Commerce Act." The bill failed of enactment in 1935 and also in 1937.

The proposal of the Committee that the equity and justification of proposed rates on long-haul traffic, as compared with the charges on shorter haul intermediate traffic, should be determined by the standards and by the procedure adhered to and followed in passing upon other railroad rates seems logical and sound. The long-and-short-haul problems of the railroads would, however, be but partially solved by the proposed change in the fourth section. The problem arises mainly from the competition of the railroads with carriers by water whose rates are not regulated by the Government and whose necessitous condition makes it impossible for them to prevent their competition with each other and with the railroads from becoming destructive warfare. The ultimate solution of the problem will be possible only when all interstate carriers are subject to a like measure of regulation by the application of like principles by a unified administrative authority.

There is one phase of the government regulation of railroad rates and revenues that has not received attention, and which consequently has not constituted a "problem," but which merits careful consideration. Should the railroads be required by the Government to set aside a portion of their net income during years of prosperity to accumulate reserves that may be drawn upon

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during periods of business depression? If the answer is in the affirmative, should the Government authorize and require the carriers to establish rates during prosperous times on a level high enough to yield a surplus sufficient to enable them to build up adequate reserves, with the understanding that when a recession in business activity reduces the traffic and revenues of the railroads the carriers shall not seek to maintain their net income by increasing their charges but shall, by reducing their rates, keep them in line with the lower level of prices in general? Briefly stated, should it be the policy of the Government to maintain railroad rates above the normal requirements of the carriers in good years, and below their normal needs in lean years? Is such a policy desirable, and practicable?

As to the theoretical desirability of such a rate-making policy there would seem to be little doubt. As a matter of business prudence, the railroads, as well as other large enterprises, should anticipate and prepare for the inevitably recurring years of depression; and, as the railroad rates are regulated by the Government, it becomes jointly responsible with the carrier for carrying out this policy of prudence. The carrying out of the policy would, however, raise some practical questions not easily answered. Presumably the Government would need not only to allow the carriers to charge rates high enough (economic conditions permitting) to enable them to build up a surplus, but also to require the carriers to use the surplus in building up a reserve fund equal to a prescribed percentage of the value of their property. This would have the effect of causing railroad dividends to stockholders to be regulated by the Government, because the demands upon net income to meet the Government's requirements as to reserve funds would have priority over possible dividends. Moreover, a railroad reserve fund that was built up during fat years to be drawn upon in lean years would, in order to be of practical assistance, have to be fluid enough to be available when needed. If not cash in the treasury, it would need to be in a form readily convertible into usable funds—and to make certain that the reserve funds of the railroads were of this character, the Government would need to prescribe and enforce the rules to be followed

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by the carriers in maintaining and investing their reserves. The repeal or modification of the present tax on undistributed surplus would also be necessary.

The Government is now exercising a large measure of control over railroad financiering, and a control that is beneficial to the public and helpful to the carriers. Apparently the Government, in order to carry out a rate-regulating policy that will enable the railroads to endure the ills of business depression more successfully while serving the public more adequately and with less burdensome charges, will need to carry the government regulation of railroad finances considerably beyond the advanced stage already reached.

### CONCLUSIONS

The survey here made of the government regulation of railroad freight classification and rate structures indicates that the desirability of placing greater emphasis upon cost of service is recognized. The uncontrolled competition of railroads with each other, and, latterly, of railroads with carriers upon the highways and waterways has largely influenced freight classification and rate-making. Considerations of expediency, of "charging what the traffic will bear" (and not go to some other carrier) instead of costs of service, have largely determined what rates competing carriers decide to charge. Government regulation is now doing much to put railroad freight classification and especially rate structures upon a more logical and systematic basis; but much has yet to be done to make cost of service as controlling a factor as it should be and as it will doubtless become, as the competitive relations of carriers by rail, road, and water are stabilized by the more comprehensive regulation of transportation agencies.

As the railroad carriers coöperate more largely and effectively with each other and with highway and waterway carriers, and as all carriers are brought under like government regulation, it will doubtless be possible to make freight classification and rate structures less complex, a result that will be beneficial to shippers as well as to all classes of carriers, and that will make government regulation both less difficult and also more constructively helpful.

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The standardization of railroad class and commodity rate structures is being brought about by the remodeling of structures in the several rate-making territories under the guidance of the Interstate Commerce Commission with the coöperation of the carriers. This evolutionary process has been accelerated during the past decade and will go on. A question not yet decided is whether the ultimate goal should or should not be class and commodity rate structures of country-wide application. Presumably the logical answer to the question is in the affirmative, but the goal will not be reached in the near future. It is, however, manifest that the standardization of railroad rate structures and of all transportation charges can be carried much beyond the point attainable under past and present conditions, if and when all the agencies of transportation are subject to like Federal regulation by legislation administered by one authority, and when the competitive and complementary relations of the several agencies are thus stabilized.

The experience of the Interstate Commerce Commission in carrying out the mandate of the Hoch-Smith Resolution shows that the theory underlying the Resolution was unsound. It called for a procedure in the investigation and adjustment of railroad rates that the Commission found to be slow, expensive, and not especially effective. Moreover, the purpose of the Resolution was of questionable wisdom, the purpose being, in effect, to impose upon prosperous industries transportation charges higher than would otherwise be levied upon them in order that the charges upon depressed industries might thereby be lowered. Fortunately the Resolution provided that the railroad rates established for the depressed industries should be such as may be lawfully made; and the United States Supreme Court, in the *Ann Arbor Case*, held that the Resolution did not require or justify the establishment of rates that would be unreasonably discriminatory and in violation of Sections 1, 2, and 3 of the Interstate Commerce Act. The Hoch-Smith Resolution has ceased to be of significance, and should be repealed, as was recommended in 1934 by the Coordinator of Transportation.

The reasons urged by the railroad carriers and by the Committee on Interstate and Foreign Commerce of the House of

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Representatives in favor of so amending the fourth section of the Interstate Commerce Act as to place long-and-short-haul rates on the same basis as other rates, as regards their reasonableness, their publication and filing by the carriers, and their regulation by the Interstate Commerce Commission in enforcing Sections 1, 2, and 3 of the Interstate Commerce Act, are convincing. The fourth section, in the present form, imposes a hardship upon the railroads that can be removed without taking from the public the protection it should have against the unfair discriminations that have in the past resulted from the unrestrained competition of the railroads with each other and with carriers by water.

Insofar as possible, government regulation of railroad rates and revenues should seek to further the development of a railroad transportation system capable of serving the public continuously and efficiently year by year under cloudy as well as clear business skies. This requires the railroad revenues to be such that they will enable the carriers to build up during prosperous years available reserves that can be drawn upon during the recurring periods of business depression. The revenues of the carriers should, if possible, be adequate to meet their needs and to maintain them in a vigorous and financially stable condition throughout the period of a complete business cycle. It is obvious that to carry out such a policy successfully the carriers must have the coöperation of the Interstate Commerce Commission, and it is equally evident that the coöperation of the Commission will involve requiring the carriers to observe such rules of financial procedure as the Commission may find to be necessary or advantageous. This would appreciably enlarge the scope of government regulation of railroad financiering.

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## CHAPTER XIV

### GOVERNMENT REGULATION OF RAILROAD PASSENGER FARES

WHILE American railroads have always derived the major share of their revenues from their freight traffic, they have in the past obtained a substantial portion of their income from passenger fares. In 1910, somewhat less than seven-tenths (68.47 per cent) of the total operating income of the railroads was from freight; somewhat more than two-tenths (22.37 per cent) from passengers; while 8.16 per cent consisted of receipts from mail and express transportation and from "other revenues." Since then, freight receipts have become an increasing, and passenger revenues a decreasing, percentage of the total operating income. In 1920, freight traffic brought in 73.22 per cent of the total revenues and passenger fares 20.67 per cent, while in 1930, the percentages were freight, 79.2 per cent, and passenger, 13.8 per cent. By 1936, the freight receipts had become 81.7 per cent of total revenues, and passenger receipts 10.2 per cent, the remainder, about 8.1 per cent, being accounted for by mail, express, and other revenues.

The foregoing recital of details shows that the passenger traffic and revenues of the railroads had begun to decline relatively to freight receipts even before the period of business depression that began at the end of 1929. The automobile had made, and is now making, larger levies upon the passenger traffic than the truck had made, and is making, upon the freight tonnage and revenues of the railroads; and although the business depression and truck competition reduced railroad freight revenues in 1934 to 55 per cent of what they were in 1929, the falling off in passenger traffic during the five years was even more rapid. Both the freight and passenger revenues of the railroads have been rising since 1934.

The passenger revenues in 1929 were only two-thirds of what they had been in 1920 and the accelerated decrease during the



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five years following 1929 caused the passenger receipts of 1934 to be only 39 per cent of those for 1929 and but 27 per cent of those for 1920. However, the tide has ceased to flow out, and has begun to rise, slowly, it is true, but quite definitely. What general policy, it may be asked, should be adopted by the carriers, with the coöperation and guidance of governmental regulatory authorities, to raise the level of the inflowing tide?

### CHANGES IN RAILROAD PASSENGER FARES, 1920 TO 1934

For a number of years before the entry of the United States into the World War the passenger fares of American railroads had been upon a low level due to the active competition of the carriers with each other and to the regulation of charges by the states. In 1916, the average railroad receipt per passenger mile was only two cents (2.042 cents). Thirteen states had enacted laws fixing maximum passenger rates. Wisconsin by legislation had established a standard fare of two cents per mile and that fare was coming to be regarded as a normal charge for day-coach travel in some parts of the country. In general, the standard one-way fare for the railroads of the country as a whole was three cents per mile for interstate travel, and also for intrastate travel, except where the states had placed the charges on a lower level. The average receipt per passenger mile was reduced to practically two-thirds of the standard one-way fare by the reductions in charges for round trip, excursion, and commutation tickets.

Shortly after having been given the necessary authority by the Federal Control Act of March 21, 1918, the Director-General of Railroads, by order dated May 25th and effective June 25, 1918, made passenger fares generally three cents a mile, except where they were already on a higher basis. Suburban fares were increased 10 per cent; and a surcharge of one half cent per mile was added to the railroad charge for passengers riding in Pullman cars.<sup>1</sup> The fare increase for day-coach riders was estimated to average about 20 per cent.

<sup>1</sup> W. J. Cunningham, *American Railroads: Government Control and Reconstruction Policies* (1922), pp. 97-98.

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As has been stated in previous discussions of railroad charges, the Transportation Act of 1920, under which the Government returned the railroads to their owners for operation, required the Interstate Commerce Commission to establish rates that would yield the carriers as a whole a reasonable annual return upon the value of their property devoted to the service of transportation. After holding hearings the Commission issued an order, effective August 26, 1920, increasing both passenger fares and freight rates. As regards freight traffic and rates, railroads of the country were subdivided into four territorial groups, the eastern, southern, western (east of the Rocky Mountains) and mountain-Pacific groups; and different percentages of increase in rates were prescribed for different groups. In dealing with passenger fares, however, there was no territorial grouping of the carriers. The same increases applied to all railroads and were as follows: <sup>2</sup>

(a) Upon all passenger traffic and services accessorial thereto, 20 per cent.

(b) A surcharge or extra charge, to accrue to the rail carriers, upon all passengers using sleeping, parlor or special equipment, amounting to 50 per cent for space occupied in such equipment.

This raised the standard interstate passenger fare from three cents per mile to three and six-tenths cents. When the Director-General of Railroads, in 1918, fixed the standard fare at three cents per mile, his order was applied to intrastate as well as to interstate fares; but, upon the termination of government operation of railroads, the fares that had been fixed by the states on intrastate traffic automatically went into force again; and thus, when the Interstate Commerce Commission raised the level of interstate passenger charges, there was a wide difference between interstate and intrastate fares. When the Interstate Commerce Commission granted the increase in interstate fares, the carriers filed with all state commissions applications for intrastate passenger fares and charges equal to those that had been established for interstate traffic. Twenty-three of the states granted the increases in full; seven states approved the increases with certain exceptions; five state authorities denied the increases in whole or in part; while in thirteen states, of which Wisconsin

<sup>2</sup> Annual Report of the Interstate Commerce Commission for 1920, p. 8.

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was one, no increase was allowed because statutory provisions prevented action by state commission.

The Transportation Act of 1920, in paragraph (4) of Section 13, provides that when the Interstate Commerce Commission after investigation finds that rates or fares fixed by a state on intrastate traffic results in "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," the Commission is to prescribe the intrastate rates and fares thereafter to be observed; and such rates and fares shall be charged by the carriers concerned, "the law of any State or the decision or order of any State authority to the contrary notwithstanding." Accordingly, when some of the states refused to put intrastate charges on a parity with, or in a reasonable relation to, interstate rates and fares, the carriers appealed to the Commission to remove the alleged unlawful discriminations caused by the refusal of certain states to change their intrastate rates and fares; and in response to the petition the Commission instituted additional proceedings. Some of the intrastate rates and fares complained of were found to be unduly prejudicial in favor of intrastate, and against interstate, commerce; and the carriers involved were ordered "to make certain increases in intrastate rates or fares or charges."

The authorities of some states instituted court proceedings to have the Commission's orders set aside, while some of the carriers applied to the courts for injunctions restraining the state authorities from interfering with carrying out the Commission's orders. The controversy was settled by the United States Supreme Court in its decision in the Wisconsin and New York rate cases that have been referred to in previous chapters. The Railroad Commission of Wisconsin quite naturally took the position that the statute of the state fixing a railroad fare of two cents per mile must control the action of the State Commission and compel it to enforce the law. The Interstate Commerce Commission's orders required the carriers to raise their intrastate passenger fares, excess baggage charges, and Pullman surcharges to the level of the interstate charges, and the carriers filed bills in equity in the District Court of the United States for the Eastern District of Wisconsin to enjoin the State Commission from

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interfering with the maintenance of the fares and charges that the Interstate Commerce Commission had prescribed. The District Court granted the restraining order sought by the carriers, and the decree of the District Court was affirmed by the United States Supreme Court.<sup>3</sup>

Likewise, on the same day, the Supreme Court sustained an order of the Interstate Commerce Commission requiring the carriers operating in the State of New York to raise their intrastate fares and charges to the level fixed by the Commission on interstate traffic. The Public Service Commission of the State of New York granted the increase in intrastate freight rates, but denied an increase in milk rates and passenger charges; and the State of New York and its attorney-general brought suit in the United States District Court for the Northern District of New York to enjoin the Interstate Commerce Commission from increasing the New York intrastate milk rates and passenger charges. New York contended that the Interstate Commerce Commission's power to change intrastate railroad charges to remove or prevent unjust discriminations against interstate commerce did not authorize the Commission to issue a state-wide order changing all intrastate rates and passenger charges. The Supreme Court ruled that this question had been decided in favor of the Commission in the decision in the Wisconsin Rate Case. The State of New York also contended that the order of the Interstate Commerce Commission could not be carried out because the charter that the New York Central Railroad Company had received from the State of New York contained a clause by which the railroad was bound not to charge more than two cents a mile for the carriage of passengers between Albany and Buffalo. The order of the Interstate Commerce Commission, it was contended, would compel the railroad company to violate its contract with the state and would deprive the people of New York of property without due process of law. The answer of the Supreme Court to this contention was a reference to a previous decision in which the Court had held that:

<sup>3</sup> *Railroad Commission of Wisconsin et al., v. Chicago, Burlington and Quincy Railroad Co.*, 257 U.S. 371, decided Feb. 27, 1922.

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Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts, between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.<sup>4</sup>

By these decisions<sup>5</sup> in the Wisconsin and New York rate cases the Supreme Court definitely validated the power of the Interstate Commerce Commission to make such changes in intrastate railroad charges as are necessary to prevent or correct unreasonable discriminations against, or burdens upon, interstate commerce; but in exercising its power to make state-wide changes in intrastate railroad charges the Commission has sought to avoid being arbitrary by granting leave to the states or other interested parties to apply to the Commission "for a modification of its order or findings as to any intrastate fares, charges or rates included therein, on the ground that the latter were not related to interstate fares, charges or rates in such a way as to contravene the provisions of the Interstate Commerce Act." To facilitate its work of administering Section 13 and other provisions of the Interstate Commerce Act, the Federal Commission has the coöperation of the state commissions. This coöperation has been helpful to the Interstate Commerce Commission and in each of the Commission's annual reports reference is made to the number and the importance of the proceedings involving intrastate-interstate rate relations that have been determined by the Federal commission with the coöperation of the state commissions.

The rapid decrease in the number of passengers carried by the railroads—from over a billion and a quarter in 1920 to about 450 millions in 1934—was only partially due to the high passenger charges established in 1920 and maintained practically without change for a decade. Year by year, travel was increasingly by private automobile. Motor-bus lines also increased in number and in the length of the routes over which they were operated; but the total volume of travel by buses was relatively small as compared with that by privately-owned motor-cars.

<sup>4</sup> State of New York v. U.S., 257 U.S. 385.

<sup>5</sup> See Chap. V, pp. 72-73, for additional discussion of the decision of the Supreme Court in the Wisconsin and New York rate cases.

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When the railroad passenger business shrank to a half and then to a third of its former volume, the Interstate Commerce Commission and the carriers realized that a change in the railway passenger services or in passenger charges or in both had become necessary.

The Commission took the first step towards bringing about a change in policy by addressing, in October, 1932, an inquiry to the presidents of all Class I railroads asking (a) whether by a general reduction in basic fares a betterment could be brought about in the volume of passenger traffic, and (b) what suggestions they might care to offer for relieving the users of freight service from the burden due to unprofitable passenger service. The Commission states in its Annual Report for the following year that replies were received from practically all the presidents, and that a large proportion of them favored a reduction in the basic passenger fare. However, the respondents differed widely as to the amount of reduction that should be made. Those opposed to any reduction "were practically all confined to the principal carriers in official territory."

The Commission took no immediate action after making its 1932 inquiry, because on the first of January, 1933, the large Southern Railway established greatly reduced fares, and its action was soon followed by two other southern lines. "On December 1, 1933, all of the carriers in southern territory established for general application fares of 1.5 cents in coaches, and 3 cents in parlor and sleeping cars; also round-trip fares in parlor and sleeping cars of 2.5 cents with a time limit of six months and 2 cents with a limit of 15 days."<sup>6</sup> The carriers in western territory on the same date "established one-way fares of 3 cents in parlor and sleeping cars and 2 cents in day coaches, also round-trip fares in parlor and sleeping cars of 2 cents per mile limited to 10 days and 2.5 cents limited to six months, and round-trip fares of 1.8 cents limited to 10 days." Pullman surcharges were done away with in both southern and western territory. However, no change was made in passenger fares and charges by the carriers in official territory, the largest roads in

<sup>6</sup> Annual Report of the Interstate Commerce Commission for 1934, p. 29.

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that section believing that they would thereby lose more revenue than they would gain.

It was doubtless partly because of the position taken by the carriers in official territory that the Interstate Commerce Commission, in June, 1934, instituted an investigation into *passenger fares and surcharges* for the twofold purpose of determining the reasonableness or unreasonableness of the passenger fares on all the railroads of the country, and whether the Pullman surcharges should be made by any railroads. The action that had been taken by the southern and western carriers, and the public protest against passenger charges, must also have strengthened the growing conviction of the Commission that the whole subject of passenger charges should be explored with a view to constructive action.

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The Commission undertook a thorough investigation of passenger fares and Pullman surcharges to decide three questions: (1) whether the Commission should fix passenger fares generally, and, if so, whether it should fix maximum or both maximum and minimum charges; (2) whether passengers in parlor- and sleeping-cars should pay higher railroad fares per mile than those riding in day-coaches, and, if so, what the difference in fares should be; and (3) whether "uniform maximum or minimum fares, or both, shall be fixed for the entire country, or whether they may vary with each major rate territory."<sup>7</sup> The investigation was conducted, as is customary, by an examiner who held hearings at which testimony was presented by counsel of the carriers in the southern, western, and eastern sections of the country, by representatives of the state railroad and public utility commissions, and by those who spoke for the United Commercial Travelers of America, the National Industrial Traffic League, the National Association of Motor Bus Operators, the National Bus Traffic Association, and the International Associa-

<sup>7</sup> *Ibid.*, p. 30.

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tion of Convention Bureaus. The examiner's report to the Commission was made in 1935.<sup>8</sup> The decision of the Commission and its order were issued February 28, 1936.

The examiner's report contained detailed information for each of the three territorial groups of carriers, and for some individual railroads, concerning the decline from 1920 to 1929 and to 1934 in the several categories of passenger traffic and in the revenues therefrom. There were also data regarding the annual deficits incurred by the railroads caused by their passenger services, regarding passenger-train and passenger-car mileage, improvements in equipment and service, and concerning other related matters. The report was comprehensive in scope and is instructive.

As the investigation was started about a year after the southern and western carriers had reduced their fares, the examiner placed especial emphasis upon the testimony of the representatives of those carriers as to the effect of the reduced passenger charges upon the volume of travel and upon the net revenues therefrom. The evidence presented indicated that the southern and western carriers had gained both in revenues and number of passengers by reducing fares, and the examiner found the reduced fares were not unreasonable. The action of these carriers met with his approval.

The three largest passenger-carrying lines in the eastern territory—the New York Central, the Pennsylvania, and the New York, New Haven and Hartford—testified for the eastern roads, other than the Baltimore and Ohio, and the Norfolk and Western, and opposed both a reduction in the basic passenger fare and the abolition of the Pullman surcharge. The Norfolk and Western had reduced its fares on a large part of its lines, and the Baltimore and Ohio advocated a reduction of fares by the eastern lines in order that it might take such action along with the other roads. The representatives of the carriers in the eastern district argued that a reduction in the basic passenger fare from 3.6 cents per mile to 2.5 cents would reduce revenues by more than 30 per cent; but the examiner in his report points out that

<sup>8</sup> Interstate Commerce Commission, Docket 26,550, Passenger Fares and Surcharges.



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the eastern carriers as the result of the application of various special or exceptional fares were securing an average revenue of 2.567 cents; and that a basic fare of 2.5 cents per mile applied to all equipment and services would have yielded nearly the same revenue. The examiner calculated that a fare of 2 cents per mile in coaches and 3 cents per mile in Pullman cars would have produced for the carriers in the eastern territory an average receipt per mile of 2.46 cents. The experience of the southern and western lines indicated that a reduction, by the eastern roads, of basic fares and their general application to traffic as a whole (other than local commutation traffic) would result in increased traffic, and the conclusion reached by the examiner was that, for the eastern carriers, "the revenue results under reduced basic fares of 2 cents in coaches and 3 cents in Pullmans would be more favorable . . . than under any higher basic fares."

Briefly summarized, the examiner's findings of facts were: (1) that the railroads must take extraordinary measures to regain their passenger traffic; (2) that the passenger market of the future looks encouraging, but to share reasonably in that market the railroad fares must be "more nearly commensurate with the price and convenience of travel by highway, and with changed economic conditions"; (3) that the experiments in reduced fares by the southern and western lines proved that remedy for the passenger difficulties is a reduction in fares; (4) that the improvement in the passenger traffic and revenues of the southern and western lines during 1934 was not due "in any great degree to improved business conditions," and that the better revenue results obtained from reduced fares may be expected to continue to improve; (5) that the conditions affecting passenger traffic in the eastern district, as compared with the southern and western districts, did not warrant the maintenance of higher fares by the eastern lines, and that there should be a uniform passenger fare basis throughout the country, the carriers in any one or more of the major districts being free to adopt a lower fare basis; (6) that the Pullman surcharge resulted in more injury than benefit to the carriers; and (7) extra fares may properly be charged on some trains between the principal cities "for extraordinary Pullman service" (for example,

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on the New York Central's "Twentieth Century Limited" and the Pennsylvania's "Broadway Limited") provided adequate passenger service between the same is provided at the regular fares.

In concluding his report the examiner recommended: (1) the abolition of the Pullman surcharge; (2) the establishment of maximum standard "fares of 2 cents per passenger mile, one way and round-trip in day coaches, and 3 cents per passenger mile, one way and round-trip, in Pullman cars," the railroads in any one or more of the major territories being free to establish fares lower than the maximum and to charge extra fares on certain trains. The examiner also reached the conclusion that the fares being charged in the southern and western districts were not unreasonable, and were not unlawful except insofar as they violated the long-and-short-haul section of the Interstate Commerce Act; and that in changing the existing system of passenger fares no restraint should be put upon carriers limiting "their right under section 22 of the Act to issue mileage, excursion, or commutation passenger tickets."

In accordance with its regular procedure the Interstate Commerce Commission submitted the report of the examiner to the railroad carriers and other "respondents" interested in the investigation and proceedings, and gave them an opportunity to file briefs and to present oral arguments in support of or in opposition to the findings and recommendations of the examiner. The larger eastern trunk lines, other than the Baltimore and Ohio, and the Norfolk and Western, requested the Commission to allow them to try out standard fares of 2.5 cents per mile for day-coach passengers and 3 cents for those riding in Pullman cars, the surcharge for Pullman seats and berths to be eliminated. The majority of the Commission, however, favored the fares recommended by the examiner in his report; accordingly, by a decision rendered February 28, 1936, and by an appropriate order to become effective June 1, 1936, the Commission established, not only for eastern trunk-line territory but for the United States as a whole, the following railroad passenger charges:

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1. The pullman surcharge is and for the future will be unreasonable, and should be eliminated.

2. The regular passenger-fare structure of respondents is and for the future will be unreasonable in violation of section 1 and in contravention of section 15a of the act to the extent that it exceeds or may exceed fares of 2 cents per passenger-mile, one way and round trip, in coaches, and 3 cents per passenger-mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or in pullman cars, or both, in any one or more of the major districts of the country; provided, that reasonable extra fares, in addition to the regular passenger fares and pullman charges for space, may be charged for passenger service which is definitely superior to that generally furnished, upon the condition that reasonably prompt and comfortable regular through service without extra fare be available to the public at hours which are substantially as convenient as those at which the extra-fare service is operated, and provided further,

3. The present experimental fares in the southern and western districts and on the Norfolk and Western are not unreasonable or otherwise unlawful.

4. The present extra fares wherever maintained are not shown to be unreasonable or otherwise unlawful.

5. Many of the present fares are violative of section 4 [long-and-short-haul section] of the act in that, while subject to varying designations or to varying time-limit, stop-over, or baggage restrictions, they are, nevertheless, fares of the same character. Respondents will be expected to abide by the law in respect of these fares.

The Commission authorized the carriers to continue to issue mileage, excursion, or commutation tickets, and the carriers were informed that the Commission's outstanding orders would be modified so far as it was necessary to permit the fares prescribed to become effective or to continue in effect. The Commission's decision permitted a minimum passenger charge of 10 cents and provided that "sufficient may be added to the fares . . . so that all of them will end in 0 or 5." The carriers were "to publish, in serviceable manner, through interline fares between all important points . . . having a population, according to the last official census, of 5,000 or more."

The Commission's decision was not unanimous. One of the commissioners did not participate in the proceedings, and, of the other ten members, four wrote dissenting opinions. One dis-

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senting commissioner stated that the fares fixed by the majority were below the cost of the service and that he found "no warrant of law for thus requiring service to be furnished at less than cost." Another dissenter expressed the opinion "that much lower fares are needed than 2 cents and 3 cents respectively to recover a large volume of business from the private automobile." His opinion was that, "Through study and experimentation they [the carriers] must develop new classes of passenger traffic, each class of service to bear a charge or fare especially adapted to it and all the different classes together to represent the largest obtainable volume of movement and public service and the highest practicable rate of return to the carriers." The two other dissenting commissioners objected to the Commission's assuming managerial duties and discretion to the extent they were being exercised in the decision and order of the majority of the Commission.

The traffic and financial results of the reduction of passenger fares to the level fixed by the Commission have been more favorable than had been predicted by the eastern carriers. The reduced fares were in effect the last seven months of the calendar year 1936. During that year the passenger revenues of the railroads of the United States were 15.1 per cent above the corresponding receipts for 1935. To what extent the increase in railroad passenger traffic was due to reduced fares in force upon the eastern lines, and to what extent the larger amount of travel by railroad was due to the improvement in general business conditions, it would be impossible to determine. The larger tonnage of freight, which raised the 1936 freight revenue 18.6 per cent above that for 1935, would doubtless have been accompanied by some increase in passenger traffic without a reduction in fares; but the fact that the lowering of fares was accompanied by such a large increase in travel as to cause the passenger revenues to be substantially greater than they had been would seem to indicate that the Commission's decision regarding the fares had been a wise one. The continuance of the increase in passenger traffic during the first half of 1937 gives promise that the passenger revenues for 1937 will be substantially larger than those for the preceding year.

## RAILROAD PASSENGER FARES

### FUTURE CONSTRUCTIVE GOVERNMENT REGULATION OF RAILROAD PASSENGER FARES

By its investigation of railroad passenger fares and by the changes it has made in basic charges and in the passenger-fare policy of the carriers, the Interstate Commerce Commission has adopted positive measures that should make the future government regulation of railroad passenger transportation more constructive and more helpful both to the carriers and the public they serve. Two contributing factors will doubtless aid the Commission in making its future regulation of railroad passenger fares increasingly effective and beneficial.

One factor will be the regulation of interstate motor-bus fares that has been provided for by the Motor Carrier Act of 1935. The declared purpose of Congress in enacting this law, as stated in the Act, was to :

promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coördinate transportation by, and regulation of, motor carriers and other carriers. . . .

As the Commission accomplishes the task of regulating common and contract "carriers by motor vehicle" in accordance with the provisions of the Act of 1935, it can eliminate the "unjust discriminations" and "destructive competitive practices" that have, during a prolonged period of reduced revenues, caused by business depression, been harmful alike to motor carriers and to the railroads. The effective and constructive government regulation of railroad passenger transportation and charges, without the regulation of motor carriers, would be impossible; but when both are regulated at the same time the Commission will be able to carry out a policy dictated by considerations of carrier interests and the public welfare. A stabilization of motor fares will be of advantage to responsible motor carriers; it will make possible a reasonable and equitable adjustment of the relation of the fares of motor and railroad carriers; and it will enable the public to obtain a reliable and efficient service at fares that are reasonable and non-discriminatory.

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As stated in the above quotation, one purpose of Congress in adopting the Motor Carrier Act of 1935 was "to coördinate transportation by . . . motor carriers and other carriers." The desirability and importance of coördinating the services of the several agencies of transportation has been emphasized by many writers. The Coördinator of Transportation, Mr. Joseph B. Eastman, has strongly stressed the need of bringing about a coördinated national system of transportation "which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art."<sup>9</sup> Now that the Interstate Commerce Commission has jurisdiction over interstate motor carriers, it will be possible to proceed with the task of developing a coördinated national system of land transportation, and as that task is accomplished a general system of passenger fares can be so developed as to enable the traveling public to secure from the unified system services of maximum efficiency and economy.

Since the railroads in Great Britain were given, by the Parliamentary Act of 1928, the power of engaging in motor transportation upon the highways, they have made rapid progress in coördinating rail and motor passenger services and charges. The government regulation of motor carriers in Great Britain under the Act of 1933 is furthering the general coördination of rail and road transportation in that country. American railroads, in spite of the absence of the regulation of interstate motor carriers prior to the Act of 1935, have acquired some important bus lines and established others. Now that both rail and interstate bus lines are regulated by the Interstate Commerce Commission, we are witnessing the establishment of an increasing number of through rail and bus routes and rates. The coördination of rail and road passenger services is being developed with accelerating speed under the control of the Commission. As this takes place it will be possible to carry out a general policy regarding passenger fares by rail and road.

<sup>9</sup> Report of the Federal Coördinator of Transportation (1935), House Document No. 89, 74th Congress, 1st Session, p. 8.

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The problems to be solved by the railroads in building up their greatly reduced passenger traffic, in reducing the costs of their services, in making travel by rail more attractive, and in increasing the efficiency of their methods of selling transportation, of operating their service, and of coöperating in handling matters of common interest to all the railroads are ably discussed in the Passenger Traffic Report issued in 1935 by the Section of Transportation Service of the staff of the Federal Coördinator of Transportation. The list of recommendations made in the Report ends with the following suggestive proposition:

Vest in the Association of American Railroads the function of, and charge it with full responsibility for, creating a single nation-wide passenger service, by appropriately unifying railway facilities, terminals, equipment, trains and schedules, and coördinating, by contract or joint rates and arrangements, railway, highway, airway, and waterway transportation.

The Interstate Commerce Commission now has but limited jurisdiction over interstate carriers other than railroad and motor carriers. Eventually, the regulation of all interstate agencies of transportation will probably be by one common authority, an enlarged and appropriately organized interstate commerce commission. In the meantime, both the railroads and the Commission will do well to make large use of the Association of American Railroads to assist in "creating a nation-wide passenger service" and in coördinating, "by contract or joint rates and arrangements," the services of competing and complementary carriers of passengers—and also carriers of freight.

## SUMMARY AND CONCLUSIONS

While the decrease in railroad passenger traffic was practically continuous from 1920 to 1929 and was rapid during the succeeding five years, the recent experience of the railroads indicates the possibility of increasing their present passenger traffic and revenues therefrom.

Railroad carriers, acting for the most part individually and separately, are doing much to promote railroad passenger travel, by improvements in equipment, speed, and service.

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The carriers in the southern and western sections of the country, by reducing fares, sought to put railroad passenger charges on a parity with the average costs of highway travel and thus adapt the charges to what travelers can and will pay for transportation. The result was an increase in the number of passengers carried by the railroads and some increase in revenues.

A single system of relatively low maximum passenger fares applying to the railroads generally throughout the country was desirable as well as logical; and its establishment by the Interstate Commerce Commission is being followed by an increase in the traffic and revenues of the carriers.

As the government regulation of interstate motor carriers is effectively accomplished, there will be an increasing degree of coördination of railroad and motor-bus passenger services, and a general system of passenger fares for rail and motor-bus services will be developed. Eventually all interstate carriers including those by water and by air, should be and presumably will be regulated by a common authority, thus making possible the coördination, in full measure, of the passenger services and charges of all the agencies of transportation.

In the past, the Interstate Commerce Commission has regulated railroad passenger fares but little as compared with its regulation of freight rates. A beginning has been made by the Commission in the constructive regulation of railroad passenger fares. There is both need and opportunity for the Commission to further the coördination of rail and motor carrier services, and to develop a general system of passenger charges that will enable the coördinated carriers to act coöperatively in serving the traveling public for fares that are reasonable alike to carrier and traveler.

## REFERENCES

Annual Reports of the Interstate Commerce Commission, especially for 1920, 1933, and 1934. Consult table of contents and index for references to passenger traffic and fares.

Decisions of United States Supreme Court:

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## CHAPTER XV

### GOVERNMENT REGULATION OF RAILROAD COMPETITION, CONSOLIDATION, AND HOLDING COMPANIES

THE many railroads by which the United States has been supplied with an adequate and efficient system of transportation by rail were built by corporate enterprise and mainly with private capital. The several railroad lines were started and were developed as independent and, for the most part, as competitive systems. Many hundred companies built railroads, some long, some short, and, although in the natural course of railroad development the larger systems became still larger by bringing together numerous railroads of lesser size, the total number of railroad systems was great. In the first decade of this century the railroads in the United States were owned by nearly 2,500 corporations of which fully 1,000 were operating companies; and while those numbers have been much reduced during the past three decades, there were, in 1933, 1,262 steam railway companies reporting to the Interstate Commerce Commission, of which 155 were Class I roads (with a gross annual revenue of \$1,000,000 or more). The remaining companies included 227 in Class II (with gross revenues of \$100,000 to \$1,000,000) and 291 in Class III (with gross revenues less than \$100,000); while the others reporting were "switching and terminal" and "lessor" companies.

The number of railroad companies in the United States has been reduced during recent years not only by consolidations and amalgamations, but also by the abandonment of numerous short-line roads whose continued service was rendered unnecessary and unprofitable because of industrial changes or the development of highway transportation. Moreover, a statement of the total number of railroad companies may be misleading, unless account is taken of their corporate interrelations and the consequent grouping of most of the railroads, especially the 155 Class I roads, into

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the relatively small number of well-known large railroad systems, such as the New York Central, the Pennsylvania, the Baltimore and Ohio, the Southern, the Illinois Central, the Union Pacific, the Santa Fé, the Southern Pacific, the Northern Pacific, the Great Northern, and more that might be mentioned. The process of railroad grouping was temporarily checked by the adverse business and competitive conditions by which the railroads were confronted after 1929, but with the return of prosperity and with the government regulation of non-railroad carriers, the process will doubtless be renewed. Railroad consolidation in the United States has by no means reached its final stage.

### LEGAL PROHIBITION OF RAILROAD CONSOLIDATION PRIOR TO 1920

Both the states and the Federal Government zealously perpetuated inter-railway competition by laws prohibiting the carriers from entering into agreements as to rates upon competitive traffic or as to the pooling of such traffic or the earnings therefrom. The public felt that free and unfettered competition was beneficial and that monopoly must be prevented. The discriminations and rate wars that accompanied, and resulted from, the unregulated rivalry of the carriers during the eighteen-seventies and -eighties were recognized as being harmful to the public as well as to the railroads; and the states and the Federal Government sought to meet the situation by prohibiting unjust discriminations. The Government was careful to assure the continuance of competition and to prevent its limitation by joint action of the carriers; while the carriers were to be penalized if they engaged in such service and rate-making practices as were certain to result from the enforced competition of dissociated railroad companies not allowed to cooperate in adopting and maintaining rates and services that were reasonable *per se* and were not unjustly discriminatory.

The nature of inter-railway competition—the fact that, when unregulated by the carriers or by public authority, it led inevitably to destructive rate wars and to discriminations that were harmful to the public—was long misunderstood by the general public and by lawmakers. Indeed, the policy of seeking by stat-

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ute to enforce inter-railway competition, instead of furthering the coöperative action of competing railroads under conditions fixed by government regulation, was adhered to until the Government's experience in wartime operation of all the railroads in the United States revealed the advantages and economies obtainable from railroad coöperation and led to the adoption of a new policy in the Transportation Act of 1920 which permitted the pooling of railroad traffic and earnings and which provided for the consolidation of the railroads into a limited number of systems of relatively equal strength. Both pooling arrangements and railroad consolidations were made subject to the approval of the Interstate Commerce Commission which can prescribe the rules of procedure and umpire their enforcement.

Congressional legislation to prevent the railroads from limiting competition with each other began with the Interstate Commerce Act of 1887, Section 5 of which made it unlawful for a carrier subject to the Act to enter into a contract or combination with another common carrier for the pooling of freight or of freight and passenger earnings. From 1870 on, the railroads had been entering into pooling agreements, and had been trying, with only partial success, to develop rate and traffic associations by means of which those agreements could be made effective and a limit could be placed upon unbridled inter-railway competition. The anti-pooling provision of the Act of 1887 compelled a reorganization of the traffic associations. Pooling agreements were done away with, but the associations were continued as agencies by means of which carriers agreed upon rates applying to the traffic in which they had a common interest.

In adopting the Sherman Antitrust Act of 1890 prohibiting contracts and combinations in restraint of interstate trade, Congress had in mind the prevention of monopolies in trade, that is, interstate commerce. The Act was not aimed at railroad monopoly, which had been dealt with in the Act of 1887; but the prohibitions of the Act of 1890 were stated in such broad terms that, in 1897 and 1898, the United States Supreme Court, in deciding the Joint Traffic Association and Trans-Missouri Freight Association cases, held that, inasmuch as Congress had not exempted railroads in prohibiting "every contract, combination

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in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states," the Antitrust Act of 1890 made illegal railroad agreements to fix and maintain rates.<sup>1</sup> These decisions further undermined the traffic associations as organizations by which the railroads sought by coöperative action to regulate their competitive relations. The situation from 1898 to 1910 was that the carriers could not act jointly in fixing competitive rates and that the Interstate Commerce Commission was without real authority to prescribe rates. It was the Mann-Elkins Act of 1910 that made possible the stabilization of competitive railroad rates and the prevention of railroad rate wars and unjust discriminations. The prohibition of railway pooling remained absolute until the Transportation Act of 1920 made it possible for competing carriers to enter into pooling agreements, when such action was approved by the Interstate Commerce Commission.

The prohibition of pooling by the Interstate Commerce Act of 1887, and the decision of the Supreme Court that the joint action of the carriers in fixing competitive rates was made illegal by the Antitrust Act of 1890 did not prevent the railroads from forming consolidations, but instead strengthened the incentive both to develop large individual systems and to bring several railroad systems under common control. The necessitous condition of the carriers during the severe business depression from 1893 through 1897 emphasized the need of limiting inter-railway competition, and the prosperity that followed 1898 made it possible to carry out plans for enlarging railroad systems. Indeed, during the decade following 1900, railroad consolidation was more active than in any other period. What took place was in part the building up and natural enlargement of railroad systems; but that was accompanied by much speculative activity by ambitious and not always scrupulous individuals, corporations, and syndicates that bought railroads for financial gain instead of for the purpose of building up larger and financially stronger systems by bringing together supplementary and competing lines.

<sup>1</sup> U.S. *v.* Trans-Missouri Freight Association, 166 U.S. 290 (1897). U.S. *v.* Joint Traffic Association, 171 U.S. 505 (1898).

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The decade and a half following 1898 was the period when the hitherto conservatively financed New Haven Railroad was exploited by the reckless and inexplicable program of acquiring at exorbitant prices the steam and electric railways and steamship lines of southern New England, carried out by the Morgan banking interests. This was the time during which the Moore-Reid syndicate built about the Rock Island Railway a consolidation to be financially manipulated for the profit of the exploiters at the expense not only of the purchasers of the great quantity of stocks and bonds that were issued but also at the expense of the public served by heavily burdened and weakened railroads. These were the years when three railroads, one of them being the Père Marquette, were brought under control of a pool that was able in 1911 to sell its properties to the Baltimore and Ohio and thus to bring upon that railroad heavy subsequent financial burdens. It was at this time that the Chicago and Alton Railroad, which up to 1898 had been a prosperous and carefully financed property, was exploited and brought to financial disaster by the secret and unscrupulous stock-watering and debt-expansion programs carried out by E. H. Harriman and his associates for their personal enrichment.<sup>2</sup> These and other speculative phases and incidents of consolidation that might be mentioned were wholly destructive in result and would now be impossible because of the government regulation of railroad financing.

To give an account of railroad consolidations and attempted consolidations during the first 10 or 15 years following 1898 would take this discussion beyond its appropriate limits;<sup>3</sup> but brief reference should be made to some attempted and actual consolidations in connection with which the purposes and results were in part constructive and beneficial as well as speculative. This was the decade and a half during which the great New York Central and Pennsylvania systems were each welding to-

<sup>2</sup> Report of Interstate Commerce Commission, 12 I.C.C. 340.

<sup>3</sup> *Railroads: Finance and Organization* (1915), by Wm. Z. Ripley, Chs. xiv, xv, gives a full account of railroad consolidations during this period. Consult also Sidney L. Miller, *Inland Transportation* (1933), Ch. xxvi; Stuart Daggett, *Principles of Inland Transportation* (1934), Ch. xxviii; and Eliot Jones, *Principles of Railway Transportation* (1924), Ch. xvii.

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gether more closely their component parts and adding to their structures; and it was also the period of the activities of the builders of railroad empires, James J. Hill and E. H. Harriman. It was during these years that the banking house of Morgan was seeking to obtain control of and to unify the railroads in the South; and it was at this time that the ambitious scion of Jay Gould was attempting to perform the impossible task of creating an enduring ocean-to-ocean transcontinental railroad system by linking together several relatively weak railroads and by adding to them new lines constructed in territories already served by strong railroads.

The history of inter-railway relations, of railroad financing and railroad monopolies during the period that intervened between the end of the business depression of 1893 to 1898 and the effective application of the Antitrust Act of 1890 to railroad combinations and the accomplishment of railroad rate regulation under the Mann-Elkins Act of 1910 was one of prolonged and exceptional business prosperity interrupted but briefly by the sudden financial panic of 1907. Conditions were favorable not only for carrying out constructive, large-scale plans for the expansion of industrial enterprises and for the consolidation of railroads, but also for the machinations of the masters of "high finance." Abundant funds were obtainable from corporations and individual investors seeking speculative as well as normal gains. It was in general a prosperous period for railroads as a whole: traffic was increasing, rates were adequate, and the competition that the railroads had from carriers by water was relatively slight, while the highways were still the servitors of the railroads instead of being the insatiable rivals that they have since become. In the absence of government regulation of their finances, the railroads afforded an alluring opportunity for individuals and syndicates to make speculative gains and for men of genius and ambition to be the builders of great railroad systems. Had the power to regulate railroad finances that was provided by the Transportation Act of 1920 been vested in the Interstate Commerce Commission 25 years earlier, the history of railroad consolidation during that quarter century would have been far different than it was.

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Early in the decade following 1900, the Pennsylvania and the New York Central rounded out their respective systems; and, having established their supremacy in the eastern trunk-line territory, they coöperated in carrying out a policy of securing such control over the other carriers in their field of operation as would make possible a large measure of monopoly control of freight rates. This was done by means of "community of interest" among the carriers that was established by the purchase by each of the two major railroad systems and by their affiliated financial backers of the stock of such railroads as they wished jointly to control, and by their securing representation on the boards of directors of the companies whose stock had been acquired.

To bring competition and the rates of the anthracite coal carriers under control, the New York Central had its subsidiary, the Lake Shore and Michigan Southern, purchase 21.7 per cent of the stock of the Reading Company, while the Pennsylvania, having bought a controlling interest in the Baltimore and Ohio, had that company purchase stock of the Reading Company equal in amount to that bought by the Lake Shore. The Reading Company owned all of the stock of the Philadelphia and Reading Railway and a majority of the stock of the Central Railroad of New Jersey, which two railroads combined were carriers of a third of all the anthracite coal. Through the large holdings of individuals and banking interests in the ownership of the stock of six other anthracite carriers and through the intercorporate stock ownership of the carriers there was a general interlocking of the directorates of the Reading Company and the other carriers. Inasmuch as the carriers through their affiliates or subsidiaries owned the larger share of the anthracite coal, they possessed a monopoly control over anthracite coal and freight rates, until the monopoly was finally and with difficulty broken down. This was done, in large part, in three ways: (1) by the Interstate Commerce Commission's enforcement of the Commodities Clause of the Hepburn Act of 1906 which prohibited the railroads from being carriers of property, other than timber and its products, which they may own in whole or in part, directly or indirectly, except such commodities as the carriers may need in the conduct



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of their own business; (2) by the Commission's control of freight rates; and (3) by the enforcement of the Commodities Clause by the Department of Justice through action in the courts.

The third means of enforcement proved to be difficult, because, while the Supreme Court upheld the constitutionality of the Commodities Clause, it held, in the first case decided, that ownership in the stock of a corporation did not constitute ownership of the property of that corporation.<sup>4</sup> This was in 1909, but two years later the Court in deciding the Lehigh Valley Case<sup>5</sup> gave the Commodities Clause greater vitality, as it also did in 1915, in its decision in the Lackawanna Case.<sup>6</sup> In the latter case the Court held that, "The railroad company, if it continues in the business of mining, must absolutely dissociate itself from the coal before transportation begins." The Court held that unless the railroad company is entirely distinct from and has no control over the company that buys coal from mines owned by the railroads, the railroad company may not be the carrier of the coal. Furthermore, in 1920, the Supreme Court ordered the Reading Company to cease to be the owner of both the Reading Railway and the Reading Coal and Iron Company, and the two companies became separate and independent.

The larger task of monopoly control undertaken by the Pennsylvania and the New York Central—that of controlling the freight rates from the mines to tide-water on bituminous coal—was accomplished by intercorporate stock membership and community of interest in management, but the period of monopoly was made short by the enforcement of the antitrust laws. In 1901, it looked as though the consolidation of the eastern trunk lines was to put an end to their competition with each other; but the public realized that railroad monopoly without government regulation of railroad construction, finances, rates, and services was to be avoided and the continuance of competition was to be safeguarded. To establish control of bituminous coal rates the Pennsylvania Railroad Company bought 37.7 per cent of the stock of the Baltimore and Ohio Railroad, and also made a large

<sup>4</sup> U.S. v. Delaware and Hudson Company, 213 U.S. 366 (1909).

<sup>5</sup> U.S. v. Lehigh Valley Railroad Company, 220 U.S. 257 (1911).

<sup>6</sup> U.S. v. Delaware, Lackawanna and Western Railroad Company, 238 U.S. 516 (1915).

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investment in the stock of the two other important bituminous coal carriers, the Norfolk and Western, and the Chesapeake and Ohio. The community of interest of the Pennsylvania and the New York Central was provided for by the purchase by the New York Central of the stock of the Chesapeake and Ohio of an amount equal to that acquired by the Pennsylvania, thus giving both purchasers an equal number of representatives on the board of directors of the Chesapeake and Ohio, which was a competitor of the Pennsylvania-controlled Norfolk and Western.

The decision of the Supreme Court in the Northern Securities Case in 1904 caused the Pennsylvania and New York Central to reconsider and largely abandon their program of building up a consolidation of the eastern trunk lines by means of community of interest, intercorporate stock ownership, and interlocking directorates. There were also other causes of a change in their policy. The Pennsylvania's large expenditures upon the New York passenger terminal gave rise to a need for funds. The stocks that had been purchased had risen in value and could be sold at a large profit; and Congress, goaded to action by the dynamic President Theodore Roosevelt, the creator and spokesman of public sentiment, was carrying on the hearings and the debates that culminated in the Hepburn Act that gave the Interstate Commerce Commission greatly increased powers, including, among others, the authority to fix railroad rates. Moreover, the soft-coal rate situation had been stabilized. Thus in 1906 the Pennsylvania sold its Baltimore and Ohio stock to the Union Pacific Railroad at a profit; its holdings of Chesapeake and Ohio stock and a part of its Norfolk and Western were also profitably sold, a portion of the latter company's stock, however, being repurchased in 1909, to the subsequent good fortune of the buyer.

The major railroads in the south, east of the Illinois Central system, were brought together into two separate but interrelated systems that have ever since maintained their dominant position. In 1893 the Morgan interests took hold of the insolvent Richmond Terminal Company and its railroads and in a few years built up the large Southern Railway system. Its two strong competitors were the Atlantic Coast Line east of the Alleghenies and the Louisville and Nashville, west thereof. In 1902, the Louisville

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and Nashville was acquired by the Atlantic Coast Line and the combination thus established had many financial interests in common with the Southern Railway system.<sup>7</sup>

The largest and most ambitious programs of railroad consolidation that were undertaken in the days before government regulation had to be reckoned with were that by which James J. Hill built up the Great Northern-Northern Pacific-Burlington combination, and that through which E. H. Harriman sought first to bring under his control all the other transcontinental lines and also to share in the control of the Hill roads. In 1901, the Great Northern and the Northern Pacific purchased 97 per cent of the stock of the Chicago, Burlington and Quincy Railroad, thereby securing direct lines to Chicago, St. Louis, Kansas City, Omaha, and Denver. This combination, brought about by Hill, invaded the territory and the traffic that Harriman had set out to monopolize; and, having some of the stock of the Northern Pacific, Harriman sought, by increasing his holdings, to obtain control of that company and thus to checkmate his great rival. In the struggle that followed Harriman lost out by a narrow margin; and to assure the permanence of the Great Northern-Northern Pacific consolidation and also to establish peace, Mr. Hill and his financial backers, J. P. Morgan and Company, organized the Northern Securities Company. This was a holding company, chartered in New Jersey in November, 1901, its stock to be exchanged at appropriate ratios for the stock of the Northern Pacific and Great Northern Railroad Companies. In March, 1904, the Supreme Court in a five to four decision held the Northern Securities Company to be a violation of the Antitrust law and by this decision, supplemented by a later one, the holders of the stock of the Securities Company were allotted stock of the two railroad companies.<sup>8</sup> The combination of the Great

<sup>7</sup> Consult the Special Report of the Interstate Commerce Commission on Intercorporate Relations of the Railways (1908), House Document, No. 475, 59th Congress, 1st Session, for detailed information. Professor Ripley's *Railroads: Finance and Organization*, before referred to, contains the essential facts well presented.

<sup>8</sup> The Northern Securities Co. v. U.S., 193 U.S. 197. Also Edward H. Harriman v. Northern Securities Co., 197 U.S. 244, decided March 6, 1905. Mr. Harriman sought unsuccessfully to bring about a modification of the Court's decree that would enable the shareholders to obtain back the railroad shares they had turned over to the securities company. The effect of this

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Northern, Northern Pacific, and the Burlington that Hill brought about has been maintained to the present.

The combination that E. H. Harriman built up had a history quite different from the one created by James J. Hill. For a while Mr. Harriman was remarkably successful. He had the foresight to purchase the Union Pacific Railroad in 1897, when it was sold under foreclosure proceedings by the United States Government for recovery of the \$58,400,000 obligation of the railroad for the principal and interest of the Government's aid in the construction of the railroad. In the prosperous years that immediately ensued he built up the property, its traffic, and revenues. By 1901, the Oregon Short Line and other former parts of the dismembered system had been reacquired, and the whole extensive system of 5,628 miles (in 1901) was largely reconstructed. The operating costs per ton mile fell as traffic rapidly increased, and Mr. Harriman was able to proceed with the larger projects that he carried out during the five years ending in 1906 with the purpose of establishing control over all the transcontinental railroads other than the Hill lines, from the domination of which he was prevented by the Hill-Morgan interests. In 1901, the Southern Pacific system with 9,500 miles of line, was virtually consolidated with the Union Pacific by a purchase of 46 per cent of the stock of the Southern Pacific, which during the following four years was physically rejuvenated by extensive improvements. Finding that the Atchison, Topeka and Santa Fé was an inconsiderate competitor in Arizona and California, the Union Pacific in 1904 bought 13 per cent of the stock of its rival; and although this stock was resold within a short time its temporary possession enabled the Union Pacific to secure representatives on the directorate of the Atchison and to accomplish the pooling of the large citrus-fruit traffic of the two railroads. Harriman caused the ultimate failure of the attempt of the Gould interests to establish a transcontinental service, when the Central Pacific, which was owned by the Southern Pacific, refused to join in through rates and services with the Denver and

was to cause Mr. Harriman to receive both Great Northern and Northern Pacific stock, and thus less of the latter company's stock than he had formerly held. In 1906, he sold, at a large profit, the railroad stocks he had received in the allotment.

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Rio Grande at Salt Lake City, and thus compelled the Gould interests to build the Western Pacific through a territory already amply supplied with railroad facilities.

Up to 1906, Harriman and the Union Pacific limited their purchases practically to building up control of lines between the Mississippi River and the Pacific; the Atchison had its line into Chicago, but the affiliation of the Union Pacific with the Atchison was brief and not close. By purchasing a controlling interest in the Illinois Central, the Southern Pacific and the Union Pacific lines were united with a large railroad system that reached from Chicago to Omaha where it connected with the Union Pacific and through St. Louis to New Orleans where it brought the Southern Pacific Railroad system and its steamship line to New York into connection with the traffic of the Mississippi Valley. The purchase of the Illinois Central stock in 1906, and of the stock of the Central of Georgia's line to the Atlantic seaboard in 1907, may be considered to have been a part of Harriman's program of building up control of affiliated railroads; but at the time the Illinois Central stock was bought, in 1906, and thereafter during the three remaining years of his life, Mr. Harriman's relation to railroads was for the most part that of a financial speculator some of whose transactions, particularly those by which the Chicago and Alton was exploited and wrecked, were such as to discredit in large part the excellent constructive work he had done in reconstituting and developing the Union Pacific and Southern Pacific systems. The investment in the stocks of numerous railroads was suggested and made possible by the huge profits that Mr. Harriman and the Union Pacific made from the sale of the stock of the Great Northern and Northern Pacific; and, while these large investments in relatively small minority holdings of several large companies were made for possible financial profits, there can be no doubt that Mr. Harriman felt that by becoming a holder of one-fifth of the stock of the Baltimore and Ohio, of 8 per cent of the New York Central, and of a small share of the New York Central's affiliate, the Chicago and Northwestern, he could so influence the policy of those roads as to strengthen their traffic relations with his Union Pacific and Southern Pacific lines. His purchase of stock of the Chicago,

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Milwaukee and St. Paul may also have been influenced by a hope of again becoming a potent factor in the territory of the Hill lines.

The very success of Mr. Harriman and his associates in their large-scale plans of railroad consolidation and affiliation was the cause of their early failure; for it stirred the Government to action to prevent the creation of powerful monopolies by private interests unregulated by public authority. In November, 1906, the Interstate Commerce Commission instituted an investigation of the consolidation activities of Mr. Harriman and the Union Pacific, and in the following July made a most instructive report in which the financial operations in connection with the Union Pacific-Southern Pacific combination and the facts regarding the Alton stock-watering were set forth in detail.<sup>9</sup> The Commission's investigation led to three conclusions: (1) that railroads should not be permitted to invest generally in the stocks of other railroads, except connecting lines; (2) that it was contrary to public policy as well as unlawful for railways to acquire control of parallel and competing lines; and (3) that the Federal Government should regulate the issuance of stocks, bonds, and securities of railroads engaged in interstate commerce. This report by the Commission was followed by action of the Government to secure a court decree requiring the dissolution of the Union Pacific-Southern Pacific combination. After five years of prosecution of its suit, the Government was unsuccessful in the United States Circuit Court, but upon appeal to the Supreme Court a favorable decision was obtained.<sup>10</sup> The combination was held to be "a combination in restraint of trade within the meaning of the Sherman Act" and the Union Pacific was to be required to make such disposition of the stock "as to effectually dissolve the unlawful combination." The proposal of the Union Pacific to dispose of its holdings of Southern Pacific stock to the Union Pacific stockholders was overruled by the Supreme Court (226 U.S. 470), other disposition of the stock being required.

In 1914, following the exposition by the Interstate Commerce

<sup>9</sup> In the matter of consolidation and combination of carriers, 12 I.C.C. pp. 277-306, decided July 11, 1907.

<sup>10</sup> *United States v. Union Pacific Railroad Co.*, 226 U.S. 61, decided Dec. 2, 1912.

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Commission of the reckless and corrupt methods by which those who had controlled the New York, New Haven and Hartford had used the assets of that company to create a transportation monopoly in New England, the consolidation attempted by the New Haven was given up under pressure of the United States Department of Justice. In fact, the attempt had already been brought to failure by the means employed by its financiers.<sup>11</sup>

The financial practices that were followed in connection with several of the railroad consolidations during the first decade and a half of this century were made possible by the absence of government regulation of railroad consolidation. As the Interstate Commerce Commission stated in 1914 in concluding its report upon the financial transactions of the New Haven Railroad, "The ensuring of honesty throughout the management of the great railroads of the country" had become "a most important question before the people." An aroused public sentiment demanded that higher standards be adopted; and an improvement in standards was made easier by the manifest evil consequences that resulted from the unregulated and unrestrained efforts of those who had sought to consolidate railroads for personal power and profit rather than for public benefit. The leaders who had mingled evil deeds with the good work they had done passed on, and their successors set about to repair the damaged structures, a task that as regards some railroad systems is still but partially performed.

Prior to the enactment of the Transportation Act of 1920 the action taken by the Federal Government to check the evil consequences of unregulated consolidation of railroads was to exercise the power to investigate railroad practices that was possessed by the Interstate Commerce Commission, and the power to institute court proceedings to enforce the provisions of the Sherman Antitrust Act of 1890. The action thus taken by the Commission and the Department of Justice has been referred to in the preced-

<sup>11</sup> The two reports of the Interstate Commerce Commission are upon *The New England Investigation* in 27 I.C.C. 561-607, decided in 1913, and *In Re Financial Transactions of the New York, New Haven and Hartford Railroad Company*, in 31 I.C.C. 32-132, submitted to the Senate of the United States, July 11, 1914, in response to a resolution adopted by that body Feb. 7, 1914. The facts developed by the Commission are well presented by Professor Ripley in his *Railroads: Finance and Organization*, pp. 251-258.

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ing discussion. Congress attempted to strengthen antitrust legislation in general by the enactment of the Clayton Act of 1914, Section 7 of which specified certain kinds of railroad combinations as being in restraint of trade, and designated other forms as being permissible. The framers of the Clayton Act doubtless expected that the Clayton Act would be especially helpful in preventing railroads from combining to restrain competition; but the actual effect of the Clayton Act in strengthening the Sherman Act as applied to railroad combinations was not very great. The Supreme Court in its decision in the Northern Securities Case,<sup>12</sup> in 1904, had interpreted the Sherman Act broadly enough to include such railroad consolidations as were inhibited by the Clayton Act. The specific purpose of Section 7 of the Clayton Act was to prohibit railroads and other corporations from purchasing the stock of railroad companies when the effect would be "to substantially lessen competition between such corporations," stock purchases solely for investment and not to exercise control being excepted. The purchase of the stock of a railroad company to prevent or restrain it from competing with another railroad company would, however, be a violation of the Sherman Act.

Congress adopted the Clayton Act to perpetuate inter-railway competition, and to prohibit railroads from combining to restrain competition. Except for the period of government operation from December, 1917, to March 1, 1920, Congress adhered to the policy of seeking to enforce railroad competition by statute to prevent railroads from concerted action in making competitive rates and from uniting competing lines into consolidated or affiliated systems. It was the experience of the Government in operating the railroads for 26 months that made the public realize that railroad coöperation and even consolidation, although it limited inter-railway competition, might be advantageous. Moreover, when the time came for the Government to return the railroads to their owners for operation, there were many railroads that were financially weak. The public served by the "weak sisters" was vitally dependent upon adequate and efficient railroad transportation; and the importance of putting all railroads, if

<sup>12</sup> Northern Securities Co. v. U.S., 193 U.S. 197.



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possible, upon a stable basis was manifest, and it was with the hope of strengthening the weak railroads by grouping them with the strong ones that the plan of consolidating all the railroads into a limited number of systems was incorporated in the Transportation Act of 1920.

### CONSOLIDATION PROVISIONS OF THE RAILROAD TRANSPORTATION ACT OF 1920

While the railroads were being operated by the Government their ownership remained with the proprietary companies, and there were no consolidations of properties or companies; but for purposes of operation the railroads were grouped territorially into seven regions. The seven regions were the Eastern, the Allegheny, Pocahontas, Southern, Northwestern, Central Western, and Southwestern. Each region had a director who reported to the Director-General of Railroads and his staff of divisional directors in Washington. The several railroads in each of the regions were operated by their officers subject to the control of the regional directors and their staffs who carried out the policy determined by the Director-General and the heads of the several divisions of his central organization in Washington. Within each region and among the regions there was a large measure of co-ordination of services and of the use of facilities. There was a zoning of coal and other traffic among regions and railroad systems to eliminate unnecessary haulage and to cause different railroads to perform the services they were best fitted, by location and facilities, to perform. There was much joint use of terminal facilities. Joint ticket offices, in large cities, took the place of separate offices for each company.

By exercising complete control over the railroads and their operation, the Government accomplished all it could have done had it been the owner of the properties operated. As regards the carrying out of general policies of operation, zoning of traffic, and administrative management there was a country-wide unification of railways, a consolidated system, that was subdivided, for operation, into seven groups, each group composing the railroads in a territory having a fairly distinct economic or indus-

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trial and traffic entity. While the operation of the railroads was undertaken and carried on by the Government to assist in the prosecution of the war, its policy, and experience in carrying out its policy, was an instructive experiment in railroad consolidation, an experiment that brought about the substitution of a statute permitting and encouraging railroad consolidations in place of the prohibitory statutes that had previously been in force.

The new legal policy regarding railroad consolidations was embodied in amendments and additions to Section 5 of the Interstate Commerce Act. This section of the Act, which had previous to its amendment by the Transportation Act of 1920 merely prohibited railroad pooling, was not only so changed as to permit pooling agreements to be entered into when approved by the Interstate Commerce Commission, but was extended to include provisions permitting railroad consolidations and mergers and setting forth the manner in which they may be carried out under the control, and with the approval, of the Interstate Commerce Commission. The additional provisions permitted a railroad company, when its action was approved by the Commission, to acquire control over another railroad carrier, by lease or purchase of stock, it being provided, however, that the control should not involve "the consolidation of such carriers into a single system for ownership and operation."

The Commission was required "to prepare and adopt a general plan for the consolidation of the railway properties of the continental United States into a limited number of systems," and it was provided that, in the grouping of railroads, "competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained." So far as these requirements permitted, the several consolidated systems should be such that the costs of transportation "as between the competitive systems" shall be the same and such that the systems can have uniform rates and earn the same rate of return upon their respective properties.<sup>13</sup> The Commission was called upon to formulate and give publicity

<sup>13</sup> That such an ideal could be attained was rather the hope of legislation than a practicable possibility.

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to a tentative plan of grouping and, after hearing all persons filing objections thereto, to adopt a definite plan of consolidation, such plan being later subject to such changes or modifications as might be found by the Commission to be in the public interest.

The Commission having adopted a plan of consolidation, two or more railroad carriers might lawfully consolidate their properties into one corporation under the following conditions: (1) The consolidation must be in harmony with the Commission's general plan and must have the Commission's approval. (2) The capitalization of the corporation that takes the place of the previous companies shall not exceed the value of the consolidated properties as determined by the Commission. (3) When carriers apply to the Commission for permission to consolidate, the governors of the states in which the property of the carriers is located shall be notified by the Commission which shall hold public hearings, after which the Commission may issue an order approving or disapproving of the consolidation. If the Commission gives its approval, the consolidation may be effected, "the law of any state or the decision or order of any state authority to the contrary notwithstanding." (4) When carriers are allowed to effect a consolidation they are freed from the provisions of the antitrust laws that might otherwise be violated.

The Commission promptly set about preparing a general plan of grouping the railroads into a limited number of systems; and, in 1920, employed Professor William Z. Ripley to make an investigation and submit a plan for the Commission to consider. Professor Ripley submitted a comprehensive report in 1921 and recommended the allotment of the railroads among 22 groups, including 19 groups built around railroad systems, and three regional groups, the New England, the Michigan Peninsula, and the Florida East Coast groups. The Commission modified Professor Ripley's plan by minimizing "dismemberment of existing lines or systems," and by allotting the railroads in northern New England to the New York Central System, and by assigning the New York, New Haven and Hartford to the Baltimore and Ohio. The Commission's tentative plan, which proposed 19 railroad groups, was issued August 3, 1921; and during the following two

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years extensive hearings were held. These elaborate hearings were completed near the end of 1923, and it was expected that the Commission would, in 1924, promulgate a definite plan of railroad consolidation.

The theory of the framers of the Transportation Act of 1920 was that the several railroad companies would proceed with the merging of their properties into the systems included in the Commission's plan. It was apparently assumed by Congress that the railroad companies were desirous of effecting consolidations, and that they would by voluntary action bring about the consolidations that were made possible by the Commission's decision. The Transportation Act of 1920 failed to accomplish what was expected. There was such rivalry among the strong railroads that, instead of coöperating heartily in working out groupings, they often sought to checkmate each other in order to prevent their present or prospective competitors from becoming too powerful. Moreover, the smaller and weaker railroads, when they were assigned by the Commission to designated groups, naturally fixed as high as possible the price that must be paid for their properties by the company with which they were to be merged. At the same time, the strong railroads were interested mainly in merging with other strong companies, and were not especially interested in taking over weaker railroads. While the general public was interested in making the weak roads strong—in solving the problem of the "weak sisters"—the strong railroad that would be the backbone of a consolidated system was not disposed to lessen its net income by the ownership and operation of properties that would yield small or negative net earnings.

Realizing that the merger of the railroads into a limited number of systems that the Commission might find, in advance of action by the carriers, to be justifiable and of advantage would not be accomplished, the Commission did not, in 1924 or 1925, adopt and promulgate a definite plan of grouping the railroads; and, instead of deciding upon a plan, it addressed a letter on February 4, 1925, to the chairman of the Senate Committee on Interstate and Foreign Commerce "in which the majority of the Commission expressed doubt as to the wisdom of the provisions

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of the law which now requires us to adopt a complete plan to which all future consolidations must conform," and in which the Commission recommended that Section 5 of the Interstate Commerce Act be so amended as to "relieve the Commission from its present duty of adopting a complete plan of consolidation," while making "unlawful any consolidation or acquisition of the control of one carrier by another in any manner whatsoever, except with the specific approval and authorization of the Commission."<sup>14</sup> The amendment proposed would have given the Commission control over proposed consolidations, and would have enabled the Commission to require the carriers to make such changes in or additions to the proposed consolidation (including the acquisition of weak lines omitted from the proposals) as the Commission might deem to be in the public interest. The appropriate Senate and House committees devoted hearings to the Commission's recommendation; but no action was taken, although the Commission repeated its proposal in its 1926, 1927, and 1928 Annual Reports.

Congress having left Section 5 of the Interstate Commerce Act unamended, the Commission felt obliged to carry out the mandate of the statute; and thus in December, 1929, it adopted and promulgated a plan of consolidating the railroads in the United States into 19 systems. Those railroads in the United States that belong to the Canadian Pacific and to the Canadian National were left with those systems thus making a total of 21 groups. The 19 consolidated systems provided for in the Commission's plan included the Boston and Maine for northern New England, the New Haven for the southern part of that section, five systems for the eastern trunk-line territory—the New York Central, the Pennsylvania, the Baltimore and Ohio, the Chesapeake and Ohio-Nickel Plate, and the Wabash-Seaboard Air Line, two systems in the South, the Southern and the Atlantic Coast line, and ten systems for the remainder of the United States—the Illinois Central, the Union Pacific, the Chicago and Northwestern, the Great Northern-Northern Pacific, the Burlington, the Chicago, Milwaukee and St. Paul, the Santa Fé, the Southern Pacific, the Rock Island-Frisco, and the Missouri Pacific. These were the sys-

<sup>14</sup> Annual Report of the Interstate Commission for 1925, pp. 13-14.

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tems among which all the railroads in the country, the short lines, as well as the large railroads, were to be divided, the Commission being free, however, to make such subsequent changes in the grouping as might later be found to be in the public interest.

As neither the carriers concerned nor other interests, such as cities and centers of production and trade served by competing railroads, were in agreement as to any specific grouping of the railroads, the plan adopted by the Commission naturally met with much opposition. The dominant systems in the eastern trunk-line territory were especially dissatisfied with the Commission's manifest purpose of defeating the strategic moves that had been made by the several rival systems, particularly the Pennsylvania Railroad, to secure a controlling interest in railroads whose possession was desired by more than one of the contesting rivals. It was the proposed establishment of a fifth consolidated system in trunk-line territory—the Wabash-Seaboard Air Line—and the allotment of railroads made to that system that was especially objected to by the carriers concerned. The New York Central was dissatisfied because neither the Delaware, Lackawanna and Western nor the Lehigh Valley was placed in its group, while it was to receive the Virginian which it did not desire to have. The Pennsylvania was to be dissociated from the prosperous Norfolk and Western which along with the Wabash and other roads was to form an additional competitor in the Pennsylvania's territory. The Western Maryland was to be taken from under the control of the Baltimore and Ohio; and the Wheeling and Lake Erie was to be dissociated from the Chesapeake and Ohio-Nickel Plate combination.

The dissatisfaction of the trunk lines with the Commission's plan of grouping caused them to enter into negotiations with each other not only for the purpose of working out a mutually satisfactory grouping of railroads in trunk-line territory into four instead of five consolidations but also with a view to agreeing upon such an allotment of the several railroads among the four systems as would be as acceptable as possible to the interested parties. It was not easy for the negotiators to come to an agreement; in numerous instances their interests and aims were conflicting; but by a give-and-take process the trunk-line car-

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riers agreed upon a four-system plan of consolidation that eliminated the (to them) objectionable Wabash-Seaboard Air Line <sup>15</sup> system and that assigned to each of the four dominant systems the railroads that it already controlled or that it considered it should control in the future. The New York Central was allotted the Lackawanna; the Pennsylvania was left in control of the Wabash and the Norfolk and Western; the Baltimore and Ohio retained the Western Maryland and was assigned the Lehigh and Hudson River that would give it a good tie-up with New England, and the Ann Arbor that would carry its lines from Toledo up, through, and across the lower peninsula of Michigan, while to the Chesapeake and Ohio-Nickel Plate combination were assigned the Lehigh Valley, in lieu of the Lackawanna, and the Wheeling and Lake Erie. A four-system plan, containing these and other less important changes in the Commission's 1929 grouping of the carriers in trunk-line territory was submitted to the Commission, which after hearings approved the plan in July, 1932, with some slight modifications.

Another change in the 1929 plan of consolidation made with the approval of the Commission was involved in the permitted acquisition by the Southern Pacific interests of control of the St. Louis and Southwestern that had been allocated to the proposed Illinois Central group. In February, 1930, the Commission took action upon a petition that had been filed in July, 1927, jointly by the Great Northern and Northern Pacific railroads asking approval of the lease of the properties of the two railroads, for operation, to a new corporation, the Great Northern Pacific Company. The Burlington road would also have been affected by the proposed lease, as the Burlington is controlled, through stock ownership, jointly by the Great Northern and Northern Pacific. The Commission authorized the Great Northern and Northern Pacific to lease their properties to a single company for operation, but stipulated that "the Burlington shall be divorced from control by the Northern Companies within a reasonable period of time, such period to be stated as nearly as may

<sup>15</sup> The financially weak Seaboard Air Line, which is in the southern territory, was joined by the Commission with the Norfolk and Western and some other trunk-line railroads, presumably because there seemed to be no other disposition that could be made of that necessitous railroad.

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be practicable." The Commission, however, suggested the possible retention of a part of the Burlington, that is, its line from the Twin Cities to Chicago. The Great Northern and Northern Pacific did not find the Commission's decision acceptable, and no action was taken. Had the two companies carried out the plan approved by the Commission it would have meant some modification of the general plan of consolidation promulgated in 1929.

No mergers under the provisions of the Transportation Act of 1920 followed the adoption of a general plan of consolidation by the Commission in 1929. As stated above, the carriers were not eager, after the passage by Congress of the Act of 1920, to effect mergers under the terms of that law, and the Commission for several years held back from promulgating a general plan of consolidation, hoping meanwhile that Congress would relieve the Commission of the duty of acting. Shortly after December, 1929, when the plan of grouping was promulgated, the financial status of the carriers, due to the business depression and the intensive competition of largely unregulated motor carriers, made it practically impossible for the carriers to work out consolidation plans even had there been a real desire on their part to proceed with the task. The eastern carriers worked out their four-system plan in 1930 to 1931, but when the plan was approved by the Commission in 1932 no further coöperative action was taken by them; and, as will be indicated presently, the public attitude towards the general consolidation of railroads into a limited number of systems, which had been one of approval in 1920, then one of increasing apathy as the years passed, changed to one of doubt and opposition following 1930, as was evidenced by the adoption that year by the United States Senate of a resolution which, had it been approved by the House of Representatives, would have suspended for a period the power of the Commission to approve of consolidations and would have prescribed for the future more exacting requirements of the carriers and the Commission as regards the formation and approval of all mergers.

Although the general merging of the railroads into a limited number of systems as contemplated by the Act of 1920 has not taken place, many individual roads have passed under the control and ownership of other railroads by lease or purchase, with



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the approval of the Interstate Commerce Commission, in accordance with the terms of Section 5 of the Interstate Commerce Act. Up to December 31, 1936, the Commission received 467 applications from the railroads for authorization of control of one carrier by another by purchase of stock or by lease or for approval of contracts for operation of one carrier's property by another company. Of these applications, 448 had been approved, the others having been denied or withdrawn, or were pending. The mileage of railroads included in the authorized purchases, leases, and operating contracts amounted to more than 81,000 miles. As will be pointed out in the following paragraphs, Section 5 of the Transportation Act of 1920 was amended by the Emergency Railroad Transportation Act of June 16, 1933. The amendments, moreover, not only changed the procedure to be followed by the carriers and the Commission in effecting railroad consolidations by the lease or purchase of one railroad by another, but it also gave the Commission control over the acquisition and consolidation of railroads by non-railroad holding companies.

### EMERGENCY RAILROAD TRANSPORTATION ACT OF 1933: THE REGULATION OF RAILROAD HOLDING COMPANIES

The Emergency Railroad Transportation Act of 1933 was enacted by Congress for four purposes. The first aim was to assist the carriers in effecting economies in management and operation by providing temporarily for a Coördinator of Transportation, most of whose investigations and recommendations have been set forth in Chapter X and elsewhere in the foregoing parts of this volume. The three other purposes were to provide for the government regulation of railroad holding companies, by amending and supplementing Section 5 of the Interstate Commerce Act, to adopt a new rule of rate-making by changing Section 15a and providing for the repeal of the recapture clause of the Interstate Commerce Act, and to simplify the process to be followed by the Interstate Commerce Commission in keeping its valuations of railroads up to date. We are here concerned with the provisions of the Act that relate to the regulation of railroad holding companies and with the effect of that regula-

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tion upon the methods by which railroad consolidations may be accomplished.

Section 5 of the Interstate Commerce Act, in the form given the section by the Act of 1933, contains, in the unaltered paragraph (1), prohibition of railway pooling except when authorized by the Commission; while paragraphs (2) and (3) continue the requirement that the Commission shall prepare and publish "a plan for the consolidation of the railroad properties in the continental United States into a limited number of systems," the plan being subject to such subsequent modifications as the Commission may deem to be in the public interest. Paragraph (4) is in two parts, it being provided in subdivision (a) that

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) for two or more carriers to consolidate or merge their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

Subdivision (b) of paragraph (4) sets forth the procedure to be followed by the Commission in deciding upon an application for approval of a proposed consolidation and provides that the Commission, after completing the prescribed procedure, may authorize the consolidation to be made "subject to such terms and conditions and such modifications as it shall find to be just and reasonable" and provided the Commission finds that "the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest." This clause of the Act places, or may place, a limitation upon the development of railroad consolidations by the initiatory and voluntary action of a group of carriers in proposing an individual consolidation to be approved or dis-

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approved upon its own merits and not primarily with regard to its relation to a general plan of railroad grouping that has been prepared by the Commission. The actual effect of the clause upon the future course of railroad consolidations will depend upon the Commission's willingness to modify in detail from time to time its general plan of railroad grouping when the approval of a desirable combination of railroads requires such modification. The Commission, as has been pointed out, has approved some railroad consolidations that were not in accord with its general plan of December, 1929.

Paragraph (5) of the Act of 1933 provides that when "a corporation which is not a railroad carrier is authorized . . . to acquire control of two or more carriers, such corporation shall thereafter" be subject to regulation by the Commission, to the same extent as are railroad companies, as regards the keeping of accounts, the making of reports, the issue of securities, and the assumption of liabilities. Thus non-railroad holding companies that are permitted to consolidate two or more railroads are made subject to regulation by the Interstate Commerce Commission. Furthermore, the Act, in paragraph (6) declares that:

It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any manner whatsoever.

Paragraph (6) also states that the words control or management "shall be construed to include the power to exercise control or management," and the succeeding paragraphs carefully describe what shall be considered to be the power to exercise control or management, the Commission being authorized by paragraph (10) to act upon its own motion or upon complaint "to investigate and determine whether any person is violating the provisions of paragraph (6)."

Paragraph (11) of the Act of 1933 seeks to give the Commission power to deal effectively with the railroad holding company situation that had developed prior to the enactment of

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the law, by authorizing the Commission upon complaint or upon its own initiative

to investigate and determine whether the holding by any person of stock or other share capital of any carrier (unless acquired with the approval of the Commission) has the effect (a) of subjecting such carrier to the control of another carrier or to common control with another carrier, and (b) of preventing or hindering the carrying out of any part of such plan or of impairing the independence, one of another, of the systems provided for in such plan. If the Commission finds after such investigation that such holding has the effects described, it shall by order provide for restricting the exercise of the voting power of such persons with respect to such stock or other share capital (by requiring the deposit thereof with a trustee, or by other appropriate means) to the extent necessary to prevent such holding from continuing to have such effects.

The Act of 1933 also provides, in paragraph (15), that carriers and corporations affected by any order made by the Commission in accordance with the provisions of the statute shall be relieved from the operation of the antitrust laws and from "all other restraints or prohibitions by or imposed under authority of law," state or Federal, "insofar as may be necessary to enable them to do anything authorized or required by such order." This is a continuation, without change, of a provision contained in Section 5 of the Transportation Act of 1920, and is a necessary part of a law substituting government regulation for statutory prohibition of railroad consolidations.

It will be noted that the Emergency Railroad Transportation Act of 1933 does away with the distinction that was made in the Act of 1920 between a "consolidation" by stock purchase or lease of one railroad company by another, both continuing to be operating companies, and a "merger" of two or more railroad companies into one new company to take the place of the former companies. By the Act of 1933, the Commission is to apply the same test in deciding upon approval or disapproval of the two types of combination. This seems to be a wise simplification of administration, and should contribute to the adequacy and efficiency of governmental regulation of railroad consolidation in general.

The major amendment made to Section 5 of the Interstate

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Commerce Act by the Act of 1933 is contained in the sections that were added to subject railroad holding companies to regulation by the Interstate Commerce Commission. There was need of such legislation. Not only railroad companies but also individuals were using holding companies to acquire control of railroads. The purpose of a railroad company in doing this might either be to build up an enlarged and integrated system or to place itself in a stronger strategic position in relation to its competitors or rivals. Individuals found the holding company to be a device by which properties could be controlled by means of but a small investment. The securities and finances of railroad companies were regulated; while those of a non-railroad holding company were not regulated. Thus, through a holding company, a railroad company might indirectly, but effectively, gain a controlling stock interest in other railroad companies without having to obtain government approval of the financial operations connected therewith. The speculative interests, individual and corporate, found that the railroads as well as industrial enterprises offered alluring opportunities for creating combinations, profitable to the promoters, with funds secured from the sale of stocks and bonds to the public, such securities being issued without any let or hindrance imposed by government regulation of the financial operations.

The shortcomings of Section 5 of the Transportation Act of 1920 in accomplishing the general consolidation of railroads, as contemplated by the framers of the statute, and the inadequate government regulation of the means and agencies by which individual consolidations were being formed contrary to the spirit and aim of the statute had become increasingly manifest before the Emergency Transportation Act of 1933 was adopted. In its Annual Report for 1928, the Interstate Commerce Commission recommended that several amendments be made to Section 5, one of the proposed amendments being to make "unlawful any consolidation or acquisition of the control of one carrier by another in any manner whatsoever, except with our specific approval and authorization." During the following year holding companies were especially active in securing control of rail-

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road companies, and the Commission, being impressed by the growing importance of the question, urged Congress to act upon the subject. In its report for 1929, the Commission referred to its report of the previous year in which "we called attention to the acquisition by individuals or groups of individuals of control of railroads." Reference was made to the ability of such holding or investment companies as the Allegheny Corporation and the Pennroad Corporation to bring several railroads under control of the same interests. Moreover, the Commission stated the process may "be facilitated by reducing the control of the holding company or of one or all of the carriers involved to a relatively small if not insignificant financial interest through various devices, such as the limitation of the voting power of certain classes of stock, the superimposing or pyramiding of one holding company on top of another, and the like." The Commission recommended that Congress investigate the subject with a view to the enactment of appropriate legislation.

The House of Representatives took prompt action upon the Commission's suggestion and authorized its Committee on Interstate and Foreign Commerce to investigate the control of railroads by holding companies and make a report with recommendations for legislation. With the able assistance of its Special Counsel, Mr. Walter M. W. Splawn, aided by a staff of lawyers, accountants, and one statistician, the Committee obtained detailed information regarding stock ownership in railroads by railroad companies, holding companies, investment trusts, individuals, and associations, and its three-volume report upon Regulation of Stock Ownership in Railroads is a rich storehouse of historical and statistical data.<sup>16</sup> In his report to the Committee Mr. Splawn recommended: (1) that the Interstate Commerce Commission be given authority to approve or disapprove "any acquisition of the control of a railroad which would result in bringing that road into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding company or otherwise"; and (2) that the Committee consider "whether or not legislation is necessary to deal with any past acquisitions of railway proper-

<sup>16</sup> House Report No. 2789, 71st Congress, 3rd Session (Feb. 20, 1931).

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ties.”<sup>17</sup> The above summary of the provisions of Section 5 of the Interstate Commerce Act as amended shows that Mr. Splawn’s recommendations were embodied in the Act of 1933.

In its annual report for 1931, the Interstate Commerce Commission concurred in Mr. Splawn’s recommendations, and in 1932 submitted to Congress the draft of a bill “to authorize, under commission supervision, every legitimate and desirable method of combining railroad properties”; and it is interesting to note that by the end of 1932, when its report for that year was prepared, the Commission had come to place increased and special emphasis upon the regulation of railroad holding companies because of the importance of protecting investors. The statement is made in the Commission’s 1932 report that when it first recommended the regulation of railroad consolidation and holding companies “the main purpose we had in mind was to prevent evasion or defeat of the consolidation-plan provisions of the Act [of 1920] which were designed to subject the unification of railroads to the orderly processes of a carefully planned scheme of public regulation . . . but recent events have brought sharply into the foreground the need for curbing the operations of holding companies in the interest of the investor.”

While the major motives of Congress in enacting the Emergency Transportation Act of 1933 doubtless were (1) to create the office of Coördinator of Transportation with the hope and expectation that real economies in railroad management and operation might thereby be effected, and (2) to amend the rule

<sup>17</sup> While the House Committee’s report was being prepared by Mr. Splawn and his staff, a study of railroad consolidations and unifications was being made by Wm. C. Green, Special Counsel of the Senate Committee on Interstate Commerce, that committee by resolution of the Senate having been authorized “to make a study of and to investigate the matter of consolidation and unification of railroad properties and the effect of such consolidations and unifications upon the public interest.” The Committee was to “report to the Senate the results of its studies and investigation, including such recommendations for legislation as it deems advisable.” Mr. Green’s Report contains an account of the legislative history of the consolidation provisions of the Transportation Act of 1920, of the Ripley and Interstate Commerce Commission plans of grouping the railroads, and of the amendatory legislation proposed from 1924 to 1929. Consult *Preliminary Report of Study of Railroad Consolidations and Unifications*, Pursuant to Senate Resolution No. 290, 71st Congress, submitted to Committee on Interstate Commerce by Wm. C. Green. The report was “printed for the use of the Committee” by the United States Government Printing Office, Washington, 1931.

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of rate-making and to repeal the recapture clause in the Act of 1920, the importance of amending the railroad consolidation provisions of Section 5 of that act and of providing for the regulation of the acquisition of control of railroads by other railroads and by non-railroad holding companies was so manifest that the recommendations that the Interstate Commerce Commission had been making for several years were included in the legislation adopted and a long step forward was taken toward the goal of successful and beneficial government regulation of railroad consolidation. Experience in the administration of the present provisions of Section 5 of the Interstate Commerce Act will determine whether further legislation is needed; but as to their being in the interest of the carriers, the investors in railroad securities, and the general public, there can be no question.

### PRINCIPLES AND POLICY OF GOVERNMENT REGULATION OF RAILROAD CONSOLIDATION

In the foregoing discussion, the importance of government regulation of railroad consolidations and of holding companies by which control over railroads is obtained has been emphasized. Such regulation is made necessary by the very nature of the forces that bring about the building up of railroad systems and their enlargement by consolidations. Railroads are constructed, extended, enlarged into systems, and united by consolidations, just as small industries become large individual or corporate enterprises that tend to federate into still larger business units, because ambitious men are eager to enjoy the satisfaction that comes from the successful accomplishment of a great and difficult task and because financial institutions controlled by ambitious men seek to accomplish large results. It is this psychological force, it is the ambitions of men, that make progress possible; and what society needs to do is not to weaken private initiative and the motive that drives men on to achievement; but rather to formulate and enforce the rules in accordance with which the game of business life shall be conducted. Moreover, the rules prescribed by government regulation need to go beyond the prohibition of what may not be done; the rules must



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make clear what may be done, and must be so framed and so administered as to give individual and corporate enterprise opportunity for successful and profitable endeavor. As has been emphasized earlier in this volume, government regulation should be constructive and helpful in aim and method.

It is possible to achieve this aim in the government regulation of railroads. There are past abuses to be remedied and there are possible future abuses to be prevented; but this can be done without depriving carriers and the public of the economies and the increased efficiency of service that can be secured by consolidating the railroads in the United States into a smaller number of systems. While the purpose and the probable result of the proposed consolidation of competitive railroads will be to make possible more extensive and efficient services at a lower cost per unit of service, such a consolidation should obviously be permitted in such manner and with such safeguards as to financial methods as an impartial and intelligent governmental regulatory authority may find to be in the public interest. As past experience has shown, many railroad consolidations have been made that were not in the public interest. Such consolidations should have been prevented and will not be allowed under government regulation. Moreover, there are many railroad problems that cannot be solved by the consolidation of the carriers into a limited number of systems, whether the consolidation be accomplished by the voluntary action of the carriers acting under government supervision, or whether the grouping be brought about by compulsion of the Government, as was done in Great Britain in 1921.

The interest of the general public and of Congress in railroad consolidation has been due to the hope that it would accomplish three desirable results:

1. That consolidation under the supervision of public authority would substitute the economies that are made possible by government control of railroad services for their more costly regulation by intercarrier competition as it has prevailed in the past. The public does not wish to see railroad competition eliminated. It believes that the competition of railroad systems with each other and the competition of "channels of commerce" with

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each other is desirable; but it should be competition that is kept within limits imposed by government regulation; and it should be such competition as will not only not weaken the competitors, but will give them the incentive essential to improvement in facilities and services.

2. While consolidation was not to eliminate or unduly restrict intercarrier and commercial competition, it may presumably be assumed that Congress provided for railroad consolidation in order to promote and strengthen the coordination of the services of the carriers, to further the joint use of facilities, to reduce unnecessary future duplication of facilities, to lessen the circuitous routing of traffic, to cut down empty-car mileage, and thus to give both the carriers and the public they serve the benefits of more economical and efficient railroad transportation. The Interstate Commerce Commission was, by the Act of 1920, to approve of consolidations if they "will be in the public interest"; and, by the Emergency Railroad Transportation Act of 1933, the Commission is to decide whether a proposed consolidation "will promote the public interest"; and, although the statutes do not mention economy and efficiency of operation and service performance as a purpose to be attained, it can hardly be possible that such purpose was absent from the thought of the legislators.

3. One very definite purpose that Congress had in mind, when the Transportation Act of 1920 was adopted and permissible consolidation was substituted for enforced inter-railway competition, was to bring the weak railroads into consolidations built up by the strong railroads, and thus to enable all sections of the country to have the service of efficient and financially stable railroads. Congress hoped to solve the pressing problem of the "weak sisters." This hope has not been realized; the general grouping of all railroads in the United States into a limited number of systems, as was expected when the Act of 1920 was adopted, has, for reasons that have been stated, not taken place; and, in the case of such individual consolidations as have been effected, the tendency has usually been for the strong road that is seeking to add other roads to its system to leave the weak lines in its territory out of the proposed consoli-

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dation. The Interstate Commerce Commission has done something to correct this tendency by stipulating, as it did in acting upon a consolidation petition of the New York Central, that certain short lines designated by the Commission should be acquired and included in the proposed consolidation before official approval would be granted. Moreover, when, in 1932, the Commission decided that the railroads in eastern trunk-line territory might be grouped into four instead of five systems, care was taken by the Commission to include the secondary as well as the major railroads that were to be included in each of the groups. However, it is not to be expected that the owners of the weak railroads can be relieved of all property losses. The public is interested in having all needed railroads continued in operation; and the purpose of legislation has been, and the aim of Commission regulation doubtless will be to bring about the consolidation of the weak and strong roads under conditions equitable to the owners of both classes of property. Just how this can best be accomplished is as yet somewhat uncertain.

The future government regulation of railroad consolidation in the United States will depend upon how certain fundamental questions of policy are answered. Shall we adhere to the policy we have thus far followed of voluntary consolidation by the interested carriers whose action is subject to Commission approval, or shall consolidation be brought about by compulsion of the Government? And shall consolidation be accomplished by apportioning all railroads among a limited number of the existing large systems such as the New York Central, the Pennsylvania, the Southern Pacific, and the like, or shall the consolidation be effected by subdividing the United States territorially into a limited number of districts and by assigning all the railroads in a district to one company? Each policy has its advocates. Another policy also has its supporters, the policy of substituting government ownership and operation in place of private ownership and government regulation. The arguments on both sides of government ownership and operation of the railroads in the United States were presented in Chapter II, and the conclusion reached was in favor of adhering to private ownership and government regulation.

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The compulsory consolidation of railroads and continuance of private ownership may be the means adopted either to bring all railroads into a limited number of large systems that will continue intersystem competition at points served by two or more systems, or the compulsory process may be followed in accomplishing the division of all the railroads in the United States territorially among a limited number of districts.

The compulsory consolidation of railroads and the continuance of private ownership and operation was successfully accomplished in Great Britain. Parliament, in 1921, allocated all the railroads in the country among four railroad groups—the groups were the Southern; Western, Northwestern, Midland and West Scottish; and the Northeastern, Eastern, and East Scottish. An amalgamation tribunal of three members was created to fix the terms and conditions of the acquisition of the several properties after the constituent companies had submitted proposals. The Tribunal accomplished its task successfully in less than the two-year period within which its work was to be done. However, it does not follow from England's experience that the compulsory consolidation of railroads in the United States could be easily or quickly effected. The area of England, Wales and Scotland is only one thirty-fourth of that of continental United States and the railway mileage in those countries is less than one-twelfth the mileage in the United States. Moreover, while there were 120 railroad corporations in Great Britain, before amalgamation, the grouping of railroads had proceeded much further than it has in this country. In each of the four sections of England, the southeastern, the southwestern, the northwestern (including North Wales) and the northeastern there was a preponderant railway system; and the less important roads were readily associated with and acquired by the four strongest systems, the railroads in Scotland being divided between the London and Northeastern, and the London, Midland and Scottish systems. The lines of these and the two other systems, the Southern Railway and the Southwestern Railway all radiate from London and numerous important cities are served by two lines, with the result that there is some competition among the four territorial systems.

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The regional consolidation of the railroads in the United States was recommended by the late Walker D. Hines who was Director-General of Railroads during the last year of government operation of the railroads. Mr. Hines would have had the railroads divided territorially among 12 districts or regions; and he would have had Congress create the same number of corporations, each with authority to take over the railroads in a district. It was anticipated that the Government would have to bring about the grouping by compulsion, condemnation proceedings being adopted when necessary to acquire properties. It is also interesting that the National Transportation Committee that was selected in 1932 by the large holders of railroad securities—mainly insurance companies, banks, and trust companies—and of which Former President Coolidge was serving as chairman at the time of his death, included among its numerous recommendations the regional consolidation of railroads. While advocating the development and government regulation of railroads and other transportation agencies, and while stating that, "Regulation . . . should not attempt to 'run the business' of transportation," it reached the conclusion that:

Parallel [railroad] lines and systems are wasteful and unnecessary. Regional consolidations should be hastened and, where necessary, enforced, looking eventually to a single national system with regional divisions and the elimination of all excess and obsolete lines and equipment. Neither holding companies nor any other device should be permitted to hinder consolidation or evade the letter or the spirit of regulatory law.

Although the National Transportation Committee further stated that, "Consolidation is so vital to the public welfare that, unless it is voluntarily accomplished within a reasonable time, the government should compel it," the Committee does not indicate what the compulsory process or means should be. The Federal Government could doubtless bring about the grouping of railroads by systems or territorially and could place their future ownership and operation in such corporations as Congress might charter. The Government could do this by the exercise of the power of eminent domain and by such resort to condemnation proceedings as might be necessary to bring about the

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required change in the ownership of railroad properties. The process would probably be an expensive one that involved a good deal of litigation and no little time in carrying out.

A more summary procedure for bringing about the consolidation of railroads by government compulsion might be possible, if the views of Mr. Leslie Craven as to the powers of Congress over interstate commerce should prove to be legally sound. Mr. Craven, who is a member of the faculty of the law school of Duke University, at the request of the Coördinator of Transportation, made a study of the legal phases of railroad consolidation and submitted a report<sup>18</sup> in which he reached the conclusion that Congress in the exercise of its power over interstate commerce could require railroad corporations engaging in interstate commerce to obtain their charters from the United States. Congress could provide for the creation of only such railroad corporations as it might consider necessary, and could thus, in effect, compel the existing railroad companies, which are state corporations, to transfer the ownership or control of their property, by sale or exchange of securities, to such Federal corporations as Congress may bring into existence.

Mr. Craven begins his exposition of the legal rights involved in effecting the consolidation of the railroads by compulsion by stating the following three principles which he holds are valid because, "The sovereignty of Congress over interstate commerce is plenary and limited only by the fifth amendment" to the Constitution:

1. Congress, in the exercise of its power to regulate commerce, can require compulsory unification of the various railroad companies into designated corporations.

2. It can authorize the creation of Federal corporations, and can require them to acquire, and the existing companies to grant, ownership or control of the operating railroad property.

3. It can forbid the existing companies to operate in interstate commerce, unless such ownership or control is conveyed to the Federal companies as required.

Mr. Craven would not substitute government ownership for private ownership of the railroads; but he would have the Gov-

<sup>18</sup> Regulation of Railroads, Appendix III, Senate Document No. 119, 73rd Congress, 2nd Session, pp. 84-105.

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ernment share in the management of the Federal corporations that are to own and operate the railroads; he would have Congress provide for a Federal Railroad Administrator, who should be a non-cabinet and non-political officer, appointed for 10 years, and who should have designated administrative powers, among them being the authority to appoint 30 per cent of the voting directors of the Federal railroad corporations, the other 70 per cent of the directors to be elected by the stockholders of the corporations. We are not especially concerned, in this discussion of government regulation of railroad consolidation, with Mr. Craven's particular proposals as to the policy to be followed by the Government in the regulation and development of the railroads after the consolidations have been effected; but, if Mr. Craven's diagnosis of the powers that Congress may exercise in bringing about railroad consolidations is accurate and valid, the accomplishment of the grouping of railroads, territorially or by systems, would seem to be a task that can be performed with less difficulty and in less time than have been assumed to be necessarily involved. No opinion is here expressed as to whether the rights that property possesses under the "due process" clause of the Fifth Amendment to the United States Constitution would be invaded in carrying out the plan of railroad consolidation that Mr. Craven recommends. It is probable that the Federal courts would be called upon to decide that question. In Great Britain the compulsory consolidation of the railways was brought about without litigation; but that may have been due in part to the absence of a written constitution defining and limiting the powers of Parliament.

The compulsory consolidation of the railroads in the United States according to a pre-arranged general plan of grouping, instead of their being consolidated more gradually by the existing railroad companies acting voluntarily under the supervision and regulatory control of the Interstate Commerce Commission, could hardly be carried out so easily as Mr. Craven suggests. The Coördinator of Transportation, Mr. Eastman, is of the opinion that "certain questions would inevitably be carried to the courts." Furthermore, the doctrine of foreordination, if applied to the consolidation of railroads, in accordance with a

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comprehensively pre-arranged plan, would give rise to other problems than those of a legal nature, the character of which is well stated by Mr. Eastman in his report on the Regulation of Railroads.<sup>19</sup> He says:

A grand consolidation plan would be open to some of the same doubts as attach to public ownership and operation. The same question would exist as to the feasibility of organizing a huge railroad system for efficient administration. There are many who believe that the intimate attention which the good executive of a smaller system can give to employes, patrons, and the detail of management is worth more than the large-scale economies of a great consolidation. At all events, the best plan of organization for a huge system is yet to be worked out. There would be the same practical difficulties, also, in making the plan operative and in adjusting the multitude of controversies over exchange of securities or other terms of acquisition. There would be the same uncertainty, over a considerable period of time, as to final results.

Mr. Eastman, however, while not favoring the present adoption of a grand plan of railroad consolidation, believes "that consolidations or other unifications of railroad properties at least within certain limits, may often be desirable"; and for a while he thought "provision for compulsory consolidation under strict supervision merits a trial, both because it would permit such union of railroads to be accelerated where that may be desirable, and because it would, if Mr. Craven is right in his law, permit consolidations to be consummated by exchange of securities and without the use of cash." Accordingly, Mr. Eastman would have had Congress empower the Interstate Commerce Commission, after full public hearing, to enforce a particular consolidation found to be in the public interest, "whenever the Coördinator requests that it [the Commission] initiate a proceeding for that purpose."<sup>20</sup> Mr. Eastman would have relieved the Commission from adhering to a fixed general plan of consolidation in enforcing a particular consolidation. A consolidation formed by requirement of the Commission should have a Federal charter.

Whether the foregoing proposal by Mr. Eastman was a practicable one is by no means certain. In the report, which was made

<sup>19</sup> *Ibid.*, p. 28.

<sup>20</sup> This assumed that the office of the Coördinator of Transportation was to be made permanent or that an official with powers similar to those of the Coördinator was to be provided for.



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in January, 1934, it was stated that work on a bill to embody the proposal in legislation was in progress, "but as it ventures into new, largely unexplored, and difficult territory, the preparation requires much time and care." Evidently the venture into the unexplored territory was not pushed to completion. In the report submitted by the Coördinator of Transportation a year later, no mention is made of giving the Interstate Commerce Commission power to enforce a particular consolidation. In the later report,<sup>21</sup> the Coördinator favors bringing about railroad consolidation by "an evolutionary development under government supervision." He would have the Commission authorized to control consolidations and unifications, by acting upon each particular case, and deciding each case, after full public hearing, upon its individual merits, without reference to a previously adopted general plan of railroad grouping.

The Coördinator, however, suggests an increase in the Commission's power that would, doubtless, facilitate the formation of system consolidations. The suggestion is "to give any carrier which wishes to bring about a unification that the Commission finds will actively promote the public interest . . . authority, if necessary, to employ the power of eminent domain for the purpose." He suggests that the Commission determine "the value of the property condemned, whether physical property or securities," the Commission's findings to be subject to review in the courts as "to errors of law or arbitrariness, the fact findings of the Commission to be conclusive." Another change proposed by the Coördinator would also be helpful. Railroad companies are state corporations and their mergers are subject "to the laws of the states, which usually require that dissenting stockholders be paid in cash." He suggests that, when two-thirds of the stockholders of a railroad company favor a merger that has been approved by the Commission, the dissenting stockholders be compensated either in securities or cash, it being provided that stockholders receiving new securities shall obtain securities which, in the judgment of the Commission, subject to review by the courts, are "worth not less than those which they held

<sup>21</sup> Report of the Federal Coördinator of Transportation, 1934 (Submitted Jan. 21, 1935), House Document No. 89, 74th Congress, 1st Session, pp. 40-43.

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in the constituent companies." Moreover, when authorized by the Federal authorities mergers might be accomplished when they would not be permitted under state laws. Although the Coördinator did not recommend the present adoption of the two foregoing suggestions, "in view of the extent and complexity of the other transportation legislation" that he was recommending, it is to be hoped that the suggestions may not be overlooked, but may be given careful consideration by Congress at an early date.

The general conclusions reached by the Coördinator of Transportation as to the policy that should be adopted by the Government regarding railroad consolidation are sound. The present policy should be to accomplish consolidations and unifications by evolution, not by revolution. General consolidation by means of government ownership of the railroads is not to be favored because "the Coördinator has seen no evidence as yet of the development of a sufficiently strong body of public opinion" to prevent the trustees or officials placed in charge of the government railways from being "under the domination or control of the political branches of the government." The grouping or consolidation of railroads territorially by dividing the country into a small number of districts and having all the railroads in a district owned and operated by one corporation is not favored, because "a strictly regional basis of unification would have the effect of greatly reducing present railroad competition but continuing it at certain favored points," which points would become "particularly advantageous for the location of industries"; moreover, there would be the practical obstacle to the adoption of regional consolidation of railroads that "it is difficult to visualize a grant by Congress of a right to private interests to monopolize railroad transportation within a great region." The opinion is also expressed that "there would be less general opposition to public ownership and operation than to such a proposal." Nor did the Coördinator favor the adoption of a policy of consolidation, by government compulsion, of the railroads of the United States into a limited number of large systems. Such grouping of the railroads as was suggested by the Prince Plan that provided for seven systems would

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greatly increase the number of non-competitive points and accentuate competition at a limited number of points. The Coordinator's view was that, "The present uneven distribution of competition would be accentuated, with enhanced danger that population and business would tend to concentrate at favored points, a most serious danger from the standpoint of proper development of the country."<sup>22</sup>

### SUMMARY AND CONCLUSIONS

The railroad systems in the United States were originated and developed by the investment of private capital in freely competitive enterprises. The growth of the systems and their relation with each other, before railroad securities and financial practices were subjected to government regulation, were affected in no small measure by the activities of men and financial syndicates whose interest in the railroads was mainly to obtain speculative profits. The present railroad systems are the results of the operation of a complex of forces: railroads have grown from small to large systems with the growth of population and the industrial development of the country; small railroads have been built into large ones by new construction and the acquisition of existing lines by men like Vanderbilt, Cassatt, Hill, Hariman, and other railroad magnates whose love of achievement and power have urged them on to large accomplishment; railroad systems thus built up by natural forces and human endeavor have been modified to some extent and in numerous instances have been seriously weakened by the reckless exploitation of their properties by speculative financiers whose doings should have been made impossible by the earlier government regulation of railroad finances and railroad consolidations.

The American people and Congress were late in realizing that the primary purpose of government regulation of the railroads was not to enforce inter-railway competition by statutory penalties, but was to keep within reasonable limits the discriminations

<sup>22</sup> *Ibid.*, p. 46, where the statement is quoted from the Report on Regulation of Railroads, Senate Document No. 119, 73rd Congress, 2nd Session, p. 29.

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and other results of the competitive rivalry of private enterprises. It was the competitive practices of the railroad companies, and of the non-railroad financial interests by which they might be controlled that called for government regulation to fix and enforce such "rules of the game" as would not only protect the public interests but be helpful to those regulated. The experience of the Government in operating the railroads in 1918 and 1919 demonstrated the advantages of regulated consolidation of the railroads, and led to the adoption of the consolidation and financial provisions of the Transportation Act of 1920. Had this legislation been enacted 20 years earlier many railway abuses might have been prevented.

By the provisions of the Act of 1920 permitting railroad consolidations and mergers subject to the approval of the Interstate Commerce Commission, a long step forward was taken toward the goal of the practical and effective government regulation of railroad consolidation; but the attainment of the goal was not possible without further legislation. The Act of 1920 did not provide for the government regulation of railroad holding companies, but, the necessity for such regulation having become manifest, it was provided for by the provisions of Title II of the Emergency Railroad Transportation Act of 1933, which gives the Interstate Commerce Commission jurisdiction over the acquisition of control of one railroad by another railroad, and also over the control of two or more railroads by a non-railroad holding company.

This provision of the Act of 1933 is sound except as to the requirement that the Commission may approve of railroad consolidations or mergers if it finds the terms and conditions to be just and reasonable, and *also* finds that "the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established" by the Commission as required by the Act of 1920. Thus, Congress, by the Act of 1933, adheres to the policy adopted in 1920 that railroad consolidation shall be accomplished by starting with a general plan of grouping railroads, by allotting each railroad to a designated group, and by subsequently considering in-

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dividual petitions for approval of a proposed consolidation with reference to the relation of the particular consolidation to a previously adopted general plan of railroad grouping. For reasons that have been stated, it would be better to authorize the Commission to act upon each consolidation petition with regard to its own merits and not with special reference to the requirements of a previously adopted general plan of railroad consolidation.

For the present, at least, the wiser method to be followed in bringing about the consolidation of railroads in the United States is to permit the railroad companies to work out such groupings or unifications of systems as seem to interested companies to be practicable financially and to promise to reduce future capital costs and to increase operating efficiency. Each consolidation plan thus formulated by the carriers should be submitted to the Interstate Commerce Commission for approval or disapproval or for such modifications as the Commission may deem to be in the public interest. Each proposed consolidation should be accepted or rejected upon its own merits, the Commission not being required to adopt and to give effect to a general, pre-arranged plan of railroad grouping. This would result in accomplishing railroad consolidation gradually over a considerable period of time by an evolutionary process; and not quickly by the revolutionary method of government compulsion. The suggestion made by the Coördinator of Transportation that, when a proposed consolidation has been approved by the Commission, the company seeking to effect the consolidation should be granted the power of acquiring, by the exercise of the right of eminent domain, such properties as can not be purchased at a reasonable cost has merit, and might appreciably hasten the ultimate accomplishment of railroad consolidation by the proposed voluntary process.

The consolidation of the railroads in the United States by building up and around the larger and stronger existing systems is preferable to dividing the country's railway net territorially and placing the railroads in each district in the ownership and under the operation of a newly created corporation. As the country has developed industrially and commercially

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certain great railroad systems have evolved. To a large extent their growth has been caused by the demand for their services and by their ability to provide the developing centers of production, the channels of commerce, and the gateways of trade with efficient means of transportation. It is usually wise to build the future upon the foundations of the past and present, instead of adopting and constructing an entirely new basis. While the territorial grouping of American railroads has received the support of high authority, the analysis of the objections to such a grouping, as presented by the Coördinator of Transportation and others, is convincing.

The consolidation of American railroads by systems instead of territorially can proceed by evolution. Territorial consolidation would necessarily have to be brought about by government compulsion and by the adoption of a policy of railroad ownership and operation fundamentally different from the policy that has prevailed in the past and that has brought into existence in the United States a railroad system that is second to none to be found in any other country in economy and efficiency of performance and in alertness to technical progress. As the future consolidation of American railroads is worked out under government regulation, the policy followed should be one that will eliminate the mistakes and evils of the past without lessening the morale of private initiative and the zeal for progress and achievement that have thus far characterized railway management in the United States.

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- Transportation Act of 1920.





PART IV

GOVERNMENT AID AND REGULATION  
OF TRANSPORTATION BY WATER



## CHAPTER XVI

### GOVERNMENT WATERWAYS POLICY:

#### I. FEDERAL, STATE, AND MUNICIPAL AID TO NAVIGATION

TRANSPORTATION by water long antedated the beginning of carriage by rail; and a discussion of the policy of the United States Government towards waterways, shipping, shipbuilding, and carriers by water must include several subjects, some of which have a historical background a knowledge of which is essential to an understanding of the present and to the formulation of a constructive program for the future. Carriers by water are of several categories each having its own characteristics and problems. There are the deep-sea carriers engaged in international commerce, the ocean carriers operating in the coastwise and intercoastal trades, the carriers on the Great Lakes, and those maintaining boat and barge services upon rivers and canals. In each of these four groups of carriers, there are not only the common carriers that serve the public generally, but also those who enter into a special contract with those they serve. There are also large producers and shippers who perform their own transportation services. Transportation upon the rails is necessarily performed solely by the companies that operate the railroads, and is a common carrier service, while upon the ocean and inland waterways there are common, contract, and private carriers. This fact makes the Government's relation to waterways and carriers by water somewhat different from, and more complicated than, its relation to the railroads and the rail carriers.

In the United States the Government's relation to transportation by water is a twofold one of aid and regulation. Waterways are public ways, those provided by nature being improved and extended by the Government, while those artificially created (such as canals), although formerly constructed in many instances by corporations, are now public works owned and op-

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erated by the Government, state or Federal. With the exception of the Federal Government's post-war, and presumably temporary, experiment of engaging in transportation upon the Mississippi River and some associated and other waterways for the avowed purpose of demonstrating how traffic upon rivers and canals can be built up and made both beneficial to the public and profitable to private enterprise, the carriers upon the waterways are individuals and companies employing private capital. The Government aids such carriers by providing and maintaining toll-free waterways; and, as will be pointed out in Chapter XIX, the government regulation of carriers by water has thus far been but slight as compared with that to which the railroads have been subject for several decades, or as compared to that applied to interstate highway carriers by the Act of 1935. The two phases of government aid and regulation of carriers by water will be considered as far as practicable separately and in turn. This chapter will discuss Federal, state, and municipal aid to navigation. Succeeding chapters will consider government aid to shipping and shipbuilding and the policy of the United States Government concerning inland waterways. The government regulation of carriers by water, past, present, and proposed, will be dealt with in Chapter XIX.

### KINDS OF GOVERNMENT AID GIVEN TRANSPORTATION BY WATER

Transportation by water in the United States is aided by the Federal, state and local governments in several related and supplementary ways, the assistance given by the National Government being largest and most varied. Aids to navigation are of primary importance, because they provide the channels required for the operation of vessels, channels of adequate width and depth, that connect the seaports with the ocean, that give access to and make serviceable the lake ports, that make navigable the rivers whose unregulated depth is variable and undependable. Another aid is provided by canals that connect navigable waterways with each other or extend them to centers of production where transportation by water would not otherwise be available. In order to keep these channels useful, adequate

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provision must be made for their maintenance and for such enlargement from time to time as may be made necessary by the growth of commerce and by the increase in the size and draft of ships. In order to make the navigation of the channels safe, the necessary lighthouses, beacons, and buoys are maintained.

Large sums have been spent by the United States Government upon inland waterways, upon the channels and harbors of the Great Lakes, and upon the canalization of rivers. The Great Lakes provide the people of the United States and Canada with the world's greatest inland waterway. The United States also has numerous extended river systems, the greatest of them being that of the Ohio, Mississippi, and other streams that drain the wide area between the Allegheny and Rocky Mountains. There are also the Hudson, Delaware, Columbia, and other lesser streams of the Atlantic and Pacific seaboard sections. In the discussion that will follow of the inland waterways policy of the United States, it will be seen that the expenditures of the Federal Government upon the improvement of river navigation and canal construction have greatly increased since 1920 and are especially large at the present time.

Until recently canals were state enterprises, the most important canal being the Erie, or, as it is now designated, the Erie Division of the New York Barge Canal System; the canal next in rank is the Illinois and Mississippi Canal recently completed by the State of Illinois with the aid of the United States. However, the Federal Government has recently constructed canals. Having purchased the Cape Cod Canal and the Chesapeake and Delaware Canal (which is now being enlarged) and having acquired the canals running south from Norfolk, the Federal Government has recently constructed a 12-foot waterway from Norfolk, Virginia, to Beaufort Inlet, North Carolina, and has extended the project by a continuous intracoastal waterway (largely canal) to lower Florida.

Waterways and their improved channels connect harbors the use of which by commerce requires the construction and operation of terminal or water-front facilities. For the most part, at the ports of the United States, terminal facilities are provided by the railroads or steamship companies, or by large industrial

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concerns; but in most ports, especially seaports, it is necessary to supplement private facilities with public wharves and docks, and in some of the largest seaports most of the water-front is owned by the city, state, or other governmental "authority" which constructs, operates, or leases the terminal facilities. The purpose of the public ownership and development of terminal facilities is to place all users of the port upon an equal footing.

Channels and terminals are for the use of shipping; and their value as transportation facilities depends upon the possibility of the profitable employment of capital in the ownership and operation of vessels upon the ocean, the Great Lakes, rivers, and canals. Ocean carriers under the American flag, engaged in international commerce, have to compete with the vessels of foreign ownership; while vessels employed in the coastal and intercoastal trade of the United States and upon the inland waters are protected from such competition by the exclusion of foreign-flag ships from the domestic commerce of the United States. Inasmuch as ships can be constructed at less cost in some foreign countries than in the United States, and can be operated at less expense under some foreign flags, it is necessary for the Government to aid those purchasing and operating American ships, if there is to be a large American merchant marine for service in the country's foreign trade and for supplying the Navy with such auxiliary vessels as may be required in time of emergency. The present and the needed mercantile marine policy of the United States will be briefly discussed in a later chapter.

Shipping in the coastal and intercoastal trades and upon the Great Lakes and other inland waterways is subject to exceptionally strong competition. Upon each route the carriers compete with each other, the competition in the coastal and intercoastal trades being especially severe; and, in general, carriers by water are in competition with carriers by rail, pipe-lines, and highways. The technical development in railroad and highway transportation, the decrease in traffic due to the business depression that started at the end of 1929, and the large consequent surplus in transportation facilities have placed the carriers by water in the domestic commerce of the United States in a position that calls for action by the Government. The rem-

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edy required, however, as will be pointed out later, is not government aid but the regulation of transportation and of the interrelations of the several kinds of carriers engaged therein.

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Aid to navigation is given by the national, state, and municipal governments; and includes, first of all, the provision of facilities such as lighthouses, channels to and within harbors, the canalization of rivers, and the construction of canals. Equally necessary and helpful assistance is given by a number of administrative departments and authorities of the Federal, state and local governments. Each of five departments of the Federal Government—the War, Commerce, Navy, Treasury, and Agricultural Departments—renders administrative assistance to navigation.

River and harbor improvements are authorized by Congress which makes appropriations to carry out the work to be done. Congress adopts projects after surveys have been made and reports have been submitted by the Corps of Engineers of the United States Army, at the head of which is the Chief of Engineers who is subordinate to the Secretary of War. The construction work is done by the Corps of Engineers usually under contracts made with private companies, but sometimes directly by the Government. Congress makes a lump-sum appropriation for river and harbor works in general, and the allotment of funds to the several individual works that have been authorized are made by the Board of Engineers for Rivers and Harbors and the Chief of Engineers.

This method of applying public funds for river and harbor improvements, which followed upon the adoption by Congress of the Budget and Accounting Act in 1921, is an improvement upon the procedure previously followed of making appropriations for individual, specified works. The allocation of public funds to public works by a non-political board of engineers is preferable to allocation determined by the pressure of political interests and by legislative action secured by well-known "pork-barrel" methods. However, there is still need for improvement

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in the methods following in expending public funds upon improving and extending waterways. Congress selects for improvement or construction individual waterways and is influenced in so doing by the pressure of organized interests and by political pressure. Under our system of government this may be inevitable; but it is perhaps not too much to hope that we shall come to think and act nationally in dealing with waterways and water resources, that we shall so spend public funds in aid of navigation as to assist in providing the country with an economically developed and a well-balanced, coördinated system of transportation by water, rail, road, and air.

This hope is strengthened by the fact that we are beginning to regard waterways as a national resource to be preserved and utilized as a whole—for power development, irrigation, local water supply, and other public purposes, as well as for navigation. By controlling streams both to prevent floods and extreme low water and to make maximum use of the services they may render, we shall give aids to navigation an appropriate place in a general program for carrying out a national policy. At least, such should be the aim and ideal that should displace political and partizan motives and that should put the stamp of disapproval upon the lavish expenditure of funds being made at the present time for the improvement of the navigation of some streams—among them the Missouri River—that cannot possibly be of any real transportation service. Such streams may merit and require regulation for purposes other than navigation, but expenditures for those purposes should be made by congressional appropriations to carry out a carefully developed plan that has been duly considered and adopted by Congress and the states in which the streams are located, the Federal and state governments each acting within their constitutional authority. For Congress to make huge appropriations for public works in general and to leave the selection of the public works, and the use of funds therefor, entirely to executive discretion and the decisions of political officials is but to continue and to emphasize a policy that should be and that eventually must be abandoned.

The Secretary of War has to do with the Government's relation to navigation not only because of the activities of the Corps



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of Engineers of the United States Army, but also because the Act of Congress of 1924, creating the government-owned Inland Waterways Corporation, stipulated that, "The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it." The Corporation was chartered to take over the government barge line then operating on the Mississippi and Warrior rivers, and now also on the Missouri River and on the recently opened canal and river waterway connecting Lake Michigan and the Mississippi River. The activities of the Inland Waterways Corporation will be discussed in Chapter XVIII upon government construction and operation of inland waterways.

The Department of Commerce, as its name would imply, is the one through which the Federal Government contacts at most points with navigation and shipping. We are not here concerned with the activities of the Department's Bureau of Foreign and Domestic Commerce, although to the extent that the Bureau is successful in increasing foreign and domestic commerce, to that extent does it create a need for navigation facilities and emphasize the importance of a constructive policy of government aid and administration.

The Bureau of Lighthouses is in the Department of Commerce. It has many duties and a large organization. As stated in the volume on *Transportation by Water*:<sup>1</sup>

The Bureau is concerned with the construction, illumination, inspection and superintendence of lighthouses, light-vessels, beacons, buoys, sea marks, and other installations designed to aid navigation, with the testing of apparatus and with the marking of channels leading to seaboard and Great Lakes harbors. It also publishes . . . aids to navigation in the weekly *Notice to Mariners*, which the bureau issues jointly with the Coast and Geodetic Survey.

The total number of lighthouses, light-ships, buoys, beacons, marks, and radio-bacons maintained by the Bureau of Lighthouses in 1937 totaled 28,108. The service required over 5,000 employees, 58 tenders, and 44 light-ships. The work was subdivided among 17 districts, each with a superintendent and a technical staff.

<sup>1</sup> E. R. Johnson, G. G. Huebner, and A. K. Henry (1935), p. 450.

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The work of the Corps of Engineers in constructing channels and that of the Bureau of Lighthouses in marking and lighting the channels is supplemented by the Coast and Geodetic Survey which was organized in 1807 and which was made a part of the Department of Commerce in 1913 when the Department was created. The Coast and Geodetic Survey prepares and publishes maps which "show with great detail and accuracy the coast line, the location of shoals and bars, the depth of the sea near the shore, the location of all channels and of all lighthouses and buoys, the location and direction of all currents, and the variation of the magnetic needle; in fact, the maps aim to give the mariner all the information he needs to enter and clear ports, to navigate the coasts, and to fish on the banks off the coasts of the United States and British America."<sup>2</sup> Maps have also been prepared for the Pacific coast of Mexico and of Central America to Panama; likewise the coasts of Porto Rico and the Philippines have been surveyed and charted; and also parts of the shores of Brazil, Cuba, and China have been charted to increase the safety of American ships. These charts prepared by the Survey are sold at a nominal price, as also are the several charts and the *Tide Tables* and *Coast Pilots* that contain sailing directions and are published by the Bureau of Lighthouses.

The Bureau of Marine Inspection and Navigation of the Department of Commerce has many regulatory duties in the performance of which it renders much assistance to navigation and shipping. The Bureau has charge of the measurement and documentation of vessels; it administers the laws governing the entrance and clearance of vessels, and the many statutes contained in the elaborate navigation laws of the United States. Vessel operators must employ seamen through the offices of shipping commissioners who are officials of the Bureau of Marine Inspection and Navigation stationed at all important ports and who enforce the numerous laws that have been enacted for the protection of seamen. The shipping commissioners arbitrate disputes between master and men and can impose fines and penalties. Their decision reached after a full hearing is final and conclusive. The steamboat inspection service enforces the laws for the

<sup>2</sup> *Ibid.*, p. 450.

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promotion of safety at sea—laws requiring the equipment of vessels with safety devices, laws providing for the regular inspection of the engines, boilers, hulls, and life-saving equipment of vessels, and the laws concerning the examination and licensing of the officers of vessels. The Bureau of Marine Inspection and Navigation publishes the *Annual List of Merchant Vessels*, which states the tonnage, speed, other data, and the ownership of all the merchant vessels of American documentation; the *Navigation Laws; The Rules for the Measurement of Vessels*; and *Radio Stations and Radio Service Bulletin*. The *Bulletin* is issued monthly and gives information regarding changes in radio laws and regulations and data as to government and commercial radio stations. The Bureau also compiles and issues annually *Merchant Marine Statistics*. The Bureau of Marine Inspection and Navigation has become increasingly helpful to shipowners, seamen, and the public as it has had experience in the administration of the comprehensive navigation laws of the United States.

In August, 1933, the responsibilities of the Department of Commerce were for a time largely increased by the abolition of the United States Shipping Board and by the transfer of its duties to the Department. This was done by a presidential decree issued in accordance with an act of Congress authorizing the President to reorganize the administration of certain parts of the Government. The regulation and promotion of shipping as provided for in the several merchant marine acts was vested in the United States Shipping Board Bureau of the Department of Commerce. By the Merchant Marine Act approved June 29, 1936, the regulation and promotion of shipping was transferred from the Department of Commerce to a Maritime Commission.

In the Navy there is a Bureau of Navigation containing the Hydrographic Office and having charge of the United States Naval Observatory. The surveys made by the Hydrographic Office, its publications, and the information sent broadcast by radio are of much value to merchant shipping as well as to the Navy:

Monthly charts and weekly bulletins covering the North Atlantic, monthly charts of the North Pacific, and less frequent charts of other

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oceans are published. These charts locate both fixed and temporary dangers to navigation, indicate the usual paths followed by storms at particular periods, the relative amounts of fog which may be met, the direction and force of prevailing winds, the direction of ocean currents, the variation of the magnetic needle and the courses to be followed in crossing the ocean.<sup>3</sup>

The Hydrographic Office receives reports from captains of vessels upon their arrival at American ports, and in some instances by cable from foreign ports, of obstructions passed on the voyage. Information can now be sent from sea by radio to the Hydrographic Office which can promptly broadcast the news received. It will be seen, from the statement here made, that unlike the Coast and Geodetic Survey of the Department of Commerce, the Hydrographic Office of the Navy Department is concerned mainly with surveys on the high seas and in foreign waters.

The Naval Observatory publishes the *American Ephemeris and Nautical Almanac* which contains the astronomical data that mariners need to have for the safe navigation of vessels. The Observatory also assists the owners and operators of vessels by testing the accuracy of navigation instruments and by determining standard time and differences in longitude.

The Treasury Department functions in several ways in aid of navigation and navigators:

1. The Coast Guard, established in 1915, took over the duties of the Life Saving Service that had been organized in 1848. The Coast Guard has a large personnel and much floating and land equipment. The seaboard and the Great Lakes are divided among 13 districts in which there were 241 life-saving stations, June 30, 1936. On that date the service included 477 regular commissioned officers and a large number of cadets and warrant officers. The total personnel included nearly 10,000 men. For equipment the Coast Guard, at that time, had 279 boats, including cutters, patrol, and picket boats, besides the life-boats and surf-boats connected with the life-saving stations. There are many airplanes, radio stations, and several thousand miles of telephone and submarine cable lines operated. During the year end-

<sup>3</sup> For a fuller account, consult the volume from which this statement is quoted, *History of Domestic and Foreign Commerce of the United States*, Vol. II, p. 252, by E. R. Johnson and collaborators.

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ing June 30, 1936, there were 7,510 persons rescued from peril and hundreds of vessels in distress were assisted. In addition to the foregoing duties the Coast Guard aids the Revenue Cutter Service in preventing smuggling and aids the Bureau of Marine Inspection and Navigation in enforcing the navigation laws. Vessels of the Coast Guard also patrol the area off the Grand Banks of Newfoundland during the months of April, May, and June. Some icebergs are destroyed and the presence and location of others, when discovered by the patrol boats or other vessels, are reported by radio to shore stations from which the information is broadcast twice daily. The expense of the ice patrol is borne jointly by the United States and European countries. While for historical reasons and because of its assistance in enforcing the customs laws, the Coast Guard is in the Treasury Department, there is statutory authority for its transfer to the Navy by the President, in time of war or other emergency. Indeed, its organization and major activities would indicate that its logical connection should be with the Navy at all times.

2. The Public Health Service is connected with the Treasury Department. Congress provided in 1870 for a marine hospital service and in 1914 that service, having meanwhile been much broadened, was reorganized as the Public Health Service. Of the many activities of the Public Health Service, there are three that concern shipping and those engaged therein; the maintenance of hospitals, the medical inspection of immigrants, and the various services connected with the enforcement of quarantine laws: the health inspection and, if necessary, fumigation of arriving vessels, and the issue of bills of health permitting vessels to clear from American ports. The scope of the hospital service is indicated by the following statement in the volume upon *Transportation by Water* (p. 458) :

Hospital and dispensary treatment are available for (1) persons employed on vessels registered under the laws of the United States, and sick and disabled seamen of foreign vessels; (2) officers and enlisted men of the Coast Guard, Coast and Geodetic Survey, Army and Navy; (3) immigrants at the port of New York; (4) officers and crews of vessels, and light keepers of the Light House Service; (5) crews of vessels engaged in the deep-sea fisheries.

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The Public Health Service is of inestimable value. During the year ending June 30, 1936, the "Service inspected 15,981 vessels, carrying 733,495 passengers and 1,182,232 seamen . . . 2,281 airplanes, carrying 31,898 persons . . . were inspected"; and the "medical officers at the various ports of entry in the United States examined 824,401 alien passengers and 722,756 alien seamen. Of these numbers, 15,106 passengers and 1,119 seamen" were found to be "afflicted with some mental or physical defect or disease." There were also 38,401 applications for immigration visas examined and 620 applicants were excluded because of defects or disease. The activities of the Public Health Service were carried on at 154 American ports, and among its services was that of making the special physical examination required of all licensed ship's officers and seamen of the Steamboat Inspection Service. The scientific research work of the Public Health Service does much to check disease and the spread of communicable diseases.

It would seem that the Department of Agriculture would not be concerned with navigation and shipping; but the United States Weather Bureau is in that Department, and the law establishing the Bureau provides that it "shall have charge of the forecasting of weather, the issue of storm warnings, the display of weather and flood signals for the benefit of agriculture, commerce and navigation, the gauging and reporting of rivers, the maintenance and operation of seacoast telegraph lines, and the collection and transmission of marine intelligence for the benefit of commerce and navigation." The great assistance of the Weather Bureau to shipping and navigation is well known.

### STATE AND MUNICIPAL AID TO NAVIGATION

Commerce being mainly interstate and foreign, the major share of the aid to commerce and navigation is by the Federal Government. However, state and municipal aid is not unimportant, and is of several kinds. Although the Constitution gave the Federal Government authority to regulate interstate and foreign commerce, it was some time after 1789 before the United States took over from the states the work of improving

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navigation, except the work of constructing and maintaining lighthouses. Comparatively few improvements were made by the states, which submitted their plans to the Federal Government for approval. In some cases the states were authorized by Congress to levy tonnage taxes on shipping to secure funds for harbor improvements, one instance of such authorization being an Act of Congress, passed in 1806, allowing the Board of Port Wardens of Philadelphia to levy a tax of four cents per ton on all vessels clearing from the port, the funds thus obtained to be used in improving the navigation of the Delaware River and in building piers.

Congress began making appropriations for harbor improvements in 1822, but such appropriations did not need to be large until vessels of deep draft required channels adequate to their needs. Beginning with 1870, Congress has each biennium, with but few exceptions, made increasingly large appropriations for the improvement of harbors and rivers, the problem being to keep the enlargement of navigable channels abreast of the growth in the size and draft of vessels and the increase in the volume of interstate and foreign commerce using the channels and harbors of the ocean and Great Lakes ports of the United States. Although the states and municipalities had been thus relieved of the expense of harbor improvements, the increasing cost of channel improvement and maintenance, and the fact that such improvements when made were commercially useful only to the extent that adequate water-front and terminal facilities were provided, there was for a time a disposition on the part of Congress to make at least some of its appropriations for rivers and harbors contingent upon action by the states. In 1905, Congress appropriated \$500,000 for completing a 30-foot channel in the Delaware, the funds to be available upon the contribution for the same purpose of \$750,000 by the State of Pennsylvania, which fund was furnished half by the state and half by the City of Philadelphia.

Although the policy of requiring the states to make specified outlays as a condition of the expenditure of Federal funds has not been generally followed there have been several instances of such requirement. The City of Savannah, Georgia, was required

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to acquire and develop water-front property as a condition of a grant of Federal funds for the improvement of the Savannah River. The Federal Government made an appropriation for the improvement of the harbor of Tampa, Florida, contingent upon the municipality's acquiring and developing a specified water-front and assuring the use of all terminals on equal and reasonable terms, the terminal charges to be subject to the approval of the Secretary of War. At Providence, Rhode Island, the Federal Government required the state and city to complete certain public terminals and harbor improvements.

It would seem that the Federal Government would do well to follow regularly the policy of making the construction of channels to and in ocean and Great Lakes ports, and of making the improvement and maintenance of river channels, contingent upon the presence or provision of terminal and other harbor facilities. The states or the municipalities would need to be made responsible for providing the necessary terminals and facilities that are not created and maintained by private interests and also be made responsible for assuring the use by the public of the terminals and facilities upon reasonable and equitable terms. Government aids to navigation might thus be of greater commercial benefit; and the state and local pressure upon the Federal Government for river and harbor improvements would be in response to real needs that would be met jointly by the benefited and the benefactor.

In the interest of safety of navigation it is important that vessels should be able to secure the services of well-qualified pilots upon approaching channels to harbors. Pilots are also needed for vessels when clearing from ports. Public authority has two responsibilities, one to assure the presence of skilled pilots, and another to require vessels to employ registered pilots to take charge of vessels while entering and clearing harbors and ports. These responsibilities are exercised jointly by the Federal and state governments.

When the United States Constitution went into effect in 1789, the several states had pilotage laws which were affirmed by Congress by providing that "until further provision is made by Congress all pilots in bays, inlets, rivers, harbors, and ports



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shall continue to be regulated by the laws of the states wherein such pilots may be, or with such laws as the states may respectively enact for the purpose." Congress has, however, found "further provision" necessary in some matters. When a port is reached by a river such as the Delaware or the Columbia that forms the boundary between states, the master of a vessel may not give preference to the pilots of one state over those of another but must take on the pilot first offering service. This legal requirement is supplemented by the pilots themselves, who organize at each important port into an association that regulates the sequence of service of the several members. All vessels in the domestic coastwise and intercoastal services must be of American registry and the navigation laws of the United States require all captains and mates of steamers to qualify as pilots and receive their licenses from the United States. Thus the master of a coastwise steamer need not take on a pilot unless he feels that one is required to assist him in making or clearing port. A sailing-vessel, however, must take on a pilot, although the vessel may be in tow of a steam tug having a licensed pilot. This is no longer a burden of much importance, but it should obviously be removed.

The states exercise their control over pilots and pilotage by creating appropriate boards or authorities, such as the Board of Commissioners of Navigation for the Delaware River established by Pennsylvania. That board is responsible for the examination, licensing, and control of pilots within its jurisdiction. The state legislature fixes the rates of pilotage that shall be charged.

The activities of the United States Bureau of the Public Health Service of the Treasury Department have been briefly described. They include the enforcement of national quarantine laws and regulations, the medical inspection of immigrants, the health inspection of arriving vessels and their fumigation if necessary, and the issue of the bills of health that vessels must obtain before clearing from American ports. The states under their general police powers can, however, take such measures as they may deem necessary for the protection of the health of their citizens. It is thus possible for the quarantine laws and

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regulations of different states to be conflicting. Moreover, the Federal Government has unquestionable authority to enforce quarantine or other health regulations in its control over interstate and foreign commerce. Prior to 1879, when an epidemic of yellow fever in the southern states made Federal quarantine regulations imperative, Congress left to the states the adoption and enforcement of all measures affecting public health; but since that date the National Government, with the approval and coöperation of the states, has broadened its activities for the promotion of public health. At the present time, the quarantine and other health regulations concerning shipping at the ports of the United States are in sole charge of the Federal Government, the present practice being described as follows in a recent (1934) statement made by the Assistant Surgeon-General of the Public Health Service:

Since 1921, the Public Health Service has administered the quarantine functions at all United States ports including those in the insular possessions. In the period between 1878 and 1921 the administration of this function was gradually delegated and transferred to the Federal Government (Public Health Service) successively by the several states. This in part was due to a growing need for uniformity in quarantine procedure at all United States ports, reflecting in large measure a growing consciousness of the international aspect of such functions.

Reference has been made to the fact that shipping and navigation at the ports of the United States are aided in varying degree by the state and municipality by their construction and operation or lease of public water-front terminal facilities.<sup>4</sup> The policy followed in the development and administration of ports varies largely in the different states of the United States. Some ports—New Orleans and San Francisco—are public ports, the water-frontage being owned and developed by the state and the terminal facilities administered by a state board. At other public ports, such as Los Angeles, San Diego, and Oakland, California, all or a large part of the frontage is owned and administered by the municipal authorities.

The semipublic port, is, however, the more usual type in the

<sup>4</sup> For a fuller discussion of this subject consult *Transportation By Water*, Chap. IV, "Ocean Terminal Facilities and Charges."

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United States—the ownership of the water-frontage and the terminal facilities being partly public and partly private. The extent of public ownership at such ports varies widely, and the ownership may be state or municipal. In general, at the ports of the United States, the larger share of the terminal facilities are provided by the railroads, navigation companies, dock or terminal companies, or large industrial concerns. These semi-public ports may have one or another of several different types of administration.

At the port of New York, there is a Municipal Department of Docks and Ferries which has authority to construct and lease public terminals and to regulate all privately-owned wharf properties. Its jurisdiction does not extend outside of the boundary of New York State; but the states of New York and New Jersey have created a Port of New York Authority “to coördinate the port of New York as a whole and to guide its comprehensive development,” and by the action taken, in 1922, by the two states the Port Authority has power to purchase, lease, and operate any terminal facility in the Port of New York District, and these facilities need not necessarily be upon the water-front nor be only for the use of carriers by water.

At Philadelphia there is a Department of Wharves, Docks and Ferries headed by a director who is a member of the Mayor’s cabinet, while at Baltimore, Maryland, and Portland, Oregon, there is a municipal board in charge of port facilities.

The port of Boston is administered by a State Commission of Waterways and Public Lands which is a division of the State Department of Public Works; and at several other ports there are state boards.

In a few instances, states other than New York and New Jersey have created port districts larger than the harbor of the principal city in the district and have set up a state authority for the improvement and development of the district as a whole. Reference has previously been made to the Board of Commissioners of Navigation for the Delaware River which has jurisdiction outside of Philadelphia over the Delaware River water-front in Pennsylvania. The State of Washington has established at Seattle a port district with an elective Port Commission charged

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with the duty of improving and developing the port facilities of the district. The State of Oregon in 1891 established a Port of Portland Authority with power to supplement the activities of the Portland Municipal Commission of Public Docks that constructs and operates the municipally owned terminals; and the Authority may levy taxes to obtain funds for improving the harbor of Portland, for improving the Willamette and Columbia rivers, and for maintaining pilotage and towage services. The Authority was also charged with the duty of constructing and operating a state dry-dock. The State of Florida established a port commission for Jacksonville in 1912 and another for Tampa the following year. The state commissions having jurisdiction over port districts larger than municipal areas have some of the characteristics of public trusts, although their organization and functions differ from those of the ordinary public trust and are also in several respects unlike the public trusts that develop and administer the terminal facilities at numerous ports of Great Britain.

In one other way the municipal authorities render an important, indeed an essential, aid to shipping and ship operation—by the exercise of police supervision over the ports and their facilities, and, in the case of a large port, the maintenance of a fire-boat patrol as a protection against fires. The policing of a large port is no small task, as is shown by the following statement concerning the port of New York:

The police department conducts the actual harbor patrol work through a harbor squad equipped with a number of patrol boats. Under normal conditions from seven to ten boats patrol the harbor continuously. The harbor squad is engaged in boarding incoming vessels when necessary, in taking off prisoners, in attending and aiding at fires along the river front, in keeping order on excursion steamers, in assisting vessels in distress, in recovering of drowned persons, in preventing stealing, as far as possible, from barges, vessels and wharves within the harbor, and in general in enforcing the laws and ordinances of the city.<sup>5</sup>

The City of New York also provides fire protection by the maintenance of 10 fire-boats, each stationed at a strategic point in the port area.

<sup>5</sup> *Ibid.*, p. 471.

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The large size of the port of New York, the great commercial activity, and the fact that it is territorially in the jurisdiction of two states causes the Federal Government to share with the municipal and state port authorities in the protection of commerce and shipping and in the enforcement of law. An officer of the Navy is stationed at New York, and, as United States Supervisor of the Harbor, has the responsibility of enforcing the Federal laws against the dumping of waste materials in the harbor. The general navigation laws of the United States are enforced by the Treasury Department through the Coast Guard with the requisite number of patrol boats.

In the foregoing summary of the main kinds of aid to navigation given by the states and municipalities, reference has been made to a number of administrative and regulatory activities connected with providing the assistance rendered. The dividing line between aid and regulation is often difficult to draw, because the main purpose of government regulation of navigation, port facilities, and shipping is to be helpful. Accordingly it has seemed best in this discussion of the services by the Federal Government, the states, and the municipalities, not to distinguish sharply between aid and regulation. Chapter XIX will discuss in some detail the Federal regulation of carriers by water.

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## CHAPTER XVII

### GOVERNMENT WATERWAYS POLICY:

#### II. AID TO SHIPBUILDING AND THE MERCHANT MARINE

THE main objectives of the policy of the Government of the United States regarding ocean transportation facilities and carriers by water engaged in the coastwise and foreign commerce of the country are a merchant marine under the national flag including vessels, constructed in the United States, that are adequate in number and that meet the service requirements as to size, speed, and types needed to enable them to supply a requisite auxiliary fleet for the Navy and Army in times of emergency and to provide at all times such transportation as will facilitate the development of interstate and foreign commerce. These objectives were stated in the preamble to the Merchant Marine Act of 1920 and reaffirmed in the preamble to the Merchant Marine Act of 1928. The latest expression of the goal that the Federal Government desires to attain in carrying out its policy towards shipbuilding and the merchant marine is the "declaration of policy" contained in the Merchant Marine Act approved June 29, 1936. The first section of the Act states that:

It is necessary for the national defense and the development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best equipped, safest and most suitable types of vessels, constructed in the United States, and manned with a trained and efficient personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

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It is easier to state a purpose than to accomplish it, but it is helpful to achievement to have a definite objective. In Chapter XIX, the Federal Government's past, present, and prospective policy of government regulation of carriers by water will be considered. It will be seen that regulation, as well as aid, of transportation and carriers by water will be needed to bring about the desired operation and development of a merchant marine under the American flag. The preceding chapter has shown the necessity for government aid to navigation and the present scope of such assistance. That discussion leads logically to an account of aid to shipbuilding in the United States and to the ownership and operation of vessels under the American flag.

### THE AMERICAN MERCHANT MARINE IN DOMESTIC AND FOREIGN COMMERCE

The limitation of the domestic commerce by water to vessels of American construction and ownership has been the Government's greatest assistance to shipbuilding in the United States and to the development of an American merchant marine. The policy of excluding foreign shipping from the domestic commerce—coastwise and on the Great Lakes and other inland waterways—was adopted in 1817; but before that date foreign ships were practically debarred from the coastwise trade because of the heavy tonnage and lighthouse taxes placed upon foreign vessels. By the Act of July 20, 1789, vessels built in the United States and owned by American citizens paid a tax of six cents per ton upon entering a port of the United States. The corresponding tonnage tax on vessels constructed in the United States after the enactment of the law, and owned in whole or in part by foreigners, was 30 cents per ton; while on vessels of foreign construction and ownership the tax was 50 cents per ton. In 1804, an additional tax of 50 cents per ton for the construction and support of lighthouses was imposed on foreign vessels, and in 1812 the rate for this tax was raised to \$1.50, making the total for the tonnage and lighthouse taxes \$2.00 per ton for foreign vessels as compared with a charge of six cents per ton



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on vessels of American construction and ownership. This heavy discrimination against foreign vessels reserved the domestic water-borne commerce to American vessels until 1817 when they were given a monopoly by the limitation of the domestic commerce to vessels of American construction and ownership.

The Act of 1817 limited documentation under the laws of the United States—registration for the foreign trade and enrolment for the domestic trade—to vessels built in the United States and owned by American citizens; and this policy of denying United States documentation to foreign-built ships was maintained without change until 1912, when, by the Panama Canal Act of August 24th of that year, vessels of foreign construction, not more than five years old, could be registered in the United States for operation in foreign commerce, if such vessels were wholly owned by American citizens or by domestic corporations whose president and managing directors were citizens of the United States. When the outbreak of the European War created a great demand for ocean shipping, Congress passed the Emergency Registry Act of August 18, 1914, removing the five-year limitation upon the age of foreign-built ships that might be registered in the United States. After the United States entered what had become the World War, Congress authorized the admission of foreign vessels to the coastwise trade. This was a temporary measure that was repealed by Section 21 of the Merchant Marine Act of 1920, which again excluded vessels of foreign construction or ownership from the domestic commerce of the United States, it being provided, however, that

foreign-built vessels admitted to American registry owned on February 1, 1920, by persons, citizens of the United States, and all foreign-built vessels owned by the United States at the time of the enactment of this Act, when sold and owned by persons, citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership, subject to the rules and regulations of such trade.

One obvious purpose of limiting the domestic water-borne commerce of the United States to vessels of American construction is to enlarge and strengthen the domestic shipbuilding industry; and the strict denial, from 1789 to 1912, of United States registry to vessels of foreign construction or ownership was also

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intended to be of assistance to American shipyards. The limitation of United States registry to vessels constructed in domestic shipyards proved to be ineffective as an aid to shipbuilding and to the American merchant marine in the foreign trade. As iron, and later steel, steamships displaced wooden sailing-vessels during the latter half of the nineteenth century, the cost of constructing vessels in the United States became higher than in Great Britain, where the necessary materials and equipment were cheaper, where wages were much lower, and where the economies of large-scale production were possible. Moreover, the expense of operating vessels was greater under the American flag than under a British, Norwegian, Swedish, Belgian, German, or Japanese flag. The result of these construction and operating handicaps was that such American capital as was invested in shipping to be employed in international commerce was placed in vessels of foreign construction and registry. It was the recognition of this fact that caused the policy that had been adhered to since 1789 to be modified by the acts of 1912 and 1914 permitting foreign-built vessels to be registered under the laws of the United States for the foreign trade, if such vessels are not more than five years old and are owned by American citizens or corporations. However, this modification of policy has been of little consequence; it did not affect the difference in the construction and operating costs of American and foreign vessels; while the competitive disadvantage of the American merchant marine in the foreign trade remained unchanged.

The tonnage of shipping under the American flag has increased with the growth of the domestic commerce. In 1937, the total gross tonnage of vessels of all types enrolled under the laws of the United States was 10,802,641.<sup>1</sup> Of this total nearly four-fifths consisted of steam and motor metal vessels; less than one-twentieth of the tonnage was of wooden vessels with steam- or

<sup>1</sup> There are three kinds of documentation. American vessels operated in the foreign trade are "registered," those employed in domestic commerce are "enrolled," while small craft of less than 20 tons are "licensed." A vessel's gross tonnage is its closed-in capacity in cubic feet divided by 100. The details required to secure the registration of a vessel are greater than those necessary to obtain enrolment.

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motor-power; about one-sixth of the tonnage was made up of wooden and metal barges; while less than 2.5 per cent of the total was the tonnage of wooden and metal sailing-vessels. The construction, repairing, replacement, and enlargement of the shipping employed in the domestic commerce give the shipyards along the Great Lakes and seaboard the larger share of their work.

The vessels registered by the United States are employed mainly in the foreign trade, although registered vessels can also engage in the coastwise trade, and some do, in connection with their movements in handling foreign commerce. The total gross tonnage, in 1937, of vessels of United States registry was 3,853,487, all but a small portion of which (about 250,000 tons) consisted of steam and motor vessels. A large share of the present American shipping engaged in the foreign and coastwise trades was constructed by the Government in carrying out the shipbuilding program started during the World War. The ships thus constructed were for the transportation of troops and supplies; they were hastily built and were for the most part of the type of freight vessels of relatively slow speed. For a large share of the vessels that the Government owned because of its wartime construction program there was no commercial need and they were scrapped after having remained idle for varying lengths of time. Some of the vessels were operated by the Government or by its corporate agents for a period; but it has been the general policy of the Government to sell to private steamship companies, at a very low price, its idle vessels and also those being operated for the Government.

### GOVERNMENT AID TO THE MERCHANT MARINE PRIOR TO THE WORLD WAR

The policy of the United States Government concerning both aid to domestic shipbuilding and assistance to the operators of vessels under the American flag has been changed a number of times during our national existence; and the changes have not been modifications of one general and consistently maintained

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scheme or plan of government support, but have been radical, one policy being followed for a time and then abandoned. There have been periods of active government aid to the shipbuilding and shipping interests, and periods when there was practically no such assistance rendered.

When, in 1789, the United States Government began functioning under the Constitution, it was the practice of each foreign country, Great Britain and others, to discriminate against foreign shipping and thus to enable the vessels under the national flag to transport as much as possible of the country's domestic and foreign commerce. This policy was adopted by the United States. Almost the first act of Congress was one imposing duties on imports to secure revenue to meet government expenses and obligations, and in this tariff act provision was made for a discount of 10 per cent in the duties on goods transported in American vessels. Five years later, in 1794, this provision of the law was so changed as to require goods brought in foreign vessels to pay duties 10 per cent higher than were levied upon imports transported in United States vessels. This policy was adhered to strictly up to 1815, when Congress adopted the policy of doing away with discriminating duties in the direct trade with countries that would agree to abolish such discriminations against American vessels. A like policy regarding indirect trade was adopted in 1828; and after 1815 and 1828 reciprocity treaties were adopted with most maritime countries, whereby the provision that has been kept in all our tariff laws imposing a discriminating duty of 10 per cent against all countries that discriminate against American shipping has ceased to be of importance.

The discriminating duties imposed by the tariff act of 1789 gave greatest protection and assistance to American vessels engaged in the trade between the United States and the Orient. The duty on tea brought to the United States from India or China varied from six to 20 cents per pound when the tea came in American vessels and from 15 to 45 cents per pound when brought in foreign ships. "All other Oriental products imported in foreign vessels were required to pay a duty of 12½ per cent ad valorem, which was nearly double the rate levied on imports

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in American vessels. Similar provisions were incorporated in various laws enacted up to 1830.”<sup>2</sup>

These discriminations in tariff duties and the burdens put upon foreign vessels by the heavy lighthouse tax and the high tonnage taxes imposed upon such vessels at American ports gave the ships under the United States flag an advantage over their competitors. Moreover, the long period of the Napoleonic Wars, while subjecting United States vessels to interference or capture by the belligerent countries, also gave American vessels a larger opportunity for service than they would have had if there had been no war between England and France. By 1815, the merchant marine of the United States was thought by Congress to be strong enough to hold its own in competition with foreign shipping. It was the day of the wooden sailing-vessels, and such ships could be constructed in the United States at less cost than they could be built in England. What the United States especially needed was a larger foreign commerce that would give it a market for its agricultural and forest products and its fish; hence Congress made provision for the negotiation of reciprocity treaties that would do away with discriminations against American commerce and shipping in foreign countries.

As to the wisdom of this policy there can be no question; the American merchant marine grew and prospered until the wooden sailing-vessel had to yield supremacy on the ocean to the steamship of iron, and later of steel, construction. By 1860, the steamship had definitely established itself as the better ocean carrier; and this gave Great Britain an advantage over the United States, because metal ships could be constructed and engined at less cost in the United Kingdom than in the United States. Moreover, at the time that the steamship began to be a real competitor of the wooden sailing-vessel, the United States had to pass through four years of Civil War. During those four years, 1861–1865, the United States merchant marine registered for the foreign trade was brought down, by destruction and losses at sea

<sup>2</sup> Consult E. R. Johnson and G. G. Huebner, *Principles of Ocean Transportation* (1918), Chap. XXVII, and E. R. Johnson, G. G. Huebner and A. K. Henry, *Transportation by Water* (1935), Chap. XXXI, for a fuller discussion than is here presented of “The Mercantile Marine Policy of the United States.”

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and by sale and transfer to foreign registry, from slightly less than two and a half million tons gross to slightly more than one and a half million tons. This loss of 40 per cent in the tonnage of American shipping in the foreign trade came at a time, and under circumstances especially favorable to Great Britain who easily established herself as the world's leading shipbuilding and maritime country.

Although the American merchant marine in the foreign trade was successful as a whole and increased from about three-quarters of a million gross tons of ships in 1840 to two and a half million tons in 1861, the competition with the British merchant marine increased in intensity. It was during these two decades also that the Cunard and other steamship companies were gradually developing steamship lines that were taking the place of sailing-vessels as carriers of passengers and mail and even of a part of the ocean freight traffic. To induce American companies to bring into existence and maintain in service passenger and mail lines consisting of high-class steamships built in the United States, Congress, in 1845, passed a mail subsidy law that authorized the Postmaster-General to contract for periods of four to 10 years with American companies for the transportation of the United States mails (1) between ports in the United States and foreign ports not less than 3,000 miles distant, (2) between ports in the United States and the West Indies or islands of the Gulf of Mexico and (3) between ports on the United States seaboard. One definite purpose of the legislation was to help American vessels compete with those of the Cunard Line which was subsidized by the British Government and which was becoming increasingly strong in the service between Liverpool and the United States.

The payments allowed by the Act of 1845, having been found to be an inadequate inducement to shipowners, an act was passed by Congress in 1847 increasing the amount that might be paid. In that year the Postmaster-General made a contract with the Ocean Steam Navigation Company for the carriage of mail between New York and Bremen, and New York and Havre with a stop at Cowes in England. Contracts with other companies were made for transporting the mails between New York and Panama,

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between Charleston and Havana, and (with the Pacific Mail Steamship Company) between the Isthmus of Panama and Astoria, Oregon, with calls at San Diego, Monterey, and San Francisco. The most important contract, the one involving the largest payment, was made with E. K. Collins who was to construct five steamers, of not less than 2,000 tons gross in size and to be equipped with engines of not less than 1,000 horse-power. The Collins Line was to be the American competitor of the British Cunard Line. It began operation in 1850. It rendered a luxurious service that was more speedy than its competitor offered; but, although its mail subsidy was so increased in 1852 that for a time it received \$858,000 for 26 voyages in a year, the Collins Line was not a financial success. Its services were more frequent than the volume of available passenger and freight traffic warranted, and the company had the misfortune to lose two of its ships. This loss caused the subsidy paid the company to be reduced to \$385,000 per annum in 1856. Two years later, Congress repealed the mail subsidy Acts of 1845 and 1847. The Cunard Line had won in the competitive struggle. It had been in successful operation for 10 years when the Collins Line was started; it had the strong support of the British Government; and it did not have to bear the loss of ships at sea as its competitor did.

The foregoing statement concerning the mail-payment Acts of 1845 and 1847 shows that the United States Government's first effort to assist the American merchant marine by means of mail subsidies was not successful. About \$14,400,000 were paid to the five companies with which mail-carrying contracts were made; the companies aided doubtless had more vessels constructed in American yards than they would otherwise have ordered, and they rendered more service than they could have performed without government aid. However, the assistance given by the Government benefited only a part of the merchant marine as a whole, and did little to aid in developing an iron shipbuilding industry and in adding to the tonnage of iron vessels under the American flag at a time when a change from wooden to iron vessels should have been begun and promoted. A policy of government subventions for the construction in the United States and operation under the American flag of iron vessels in the domestic and

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foreign commerce would have been more appropriate. The withdrawal of government aid to shipping came at an unfortunate time, shortly before the Civil War brought about a large reduction in the tonnage of vessels engaged in the foreign trade under the American flag; and it is not surprising that the American merchant marine in 1865 was not able to regain the position it had once held as a carrier of the foreign trade of the United States and other countries. The United States at that time had a merchant marine of reduced tonnage that was composed almost entirely of wooden vessels, while its principal competitor had already made substantial progress in the construction and use of iron ships.

During the four years of the Civil War, there were 100,000 tons of vessels under the United States flag captured by Confederate cruisers and 150,000 tons were lost at sea. To avoid the war risk, about 800,000 tons of vessels were sold to foreigners or transferred to foreign flags. The vessels thus put under foreign registry were denied readmission to American registry at the close of the War. They might better have been admitted. Moreover, until 1868, the heavy war revenue taxes on American shipping were continued. Congress was also dilatory in exempting from import duties materials to be used in constructing vessels in the United States. Such duties were taken off materials for wooden vessels in 1872; but similar action regarding materials for iron and steel vessels was not taken until 1890.

Practical measures for building up generally the merchant marine engaged in foreign commerce were not given much consideration by the American people or by Congress during several decades following the Civil War. It was a period of rapid development of domestic industries, of the settlement of the West, of expanding markets at home, of the profitable investment of capital within the United States. Foreign commerce and American shipping employed therein were given secondary consideration. If the exports and imports could be carried at less cost in foreign vessels, let them be so carried, at least for the present; but there ought, at least, to be some passenger and mail ocean lines under the American flag, even if government aid was needed. Such seems to have been the thought of the time. Con-



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sequently, Congress, in 1865, again sought, although in a somewhat half-hearted manner, to give government assistance by ocean mail-carrying contracts. To provide for a monthly mail service between Philadelphia and Rio Janeiro, a contract was made for the carriage of mails in vessels of at least 2,000 tons, to be built in American yards under naval supervision and to be subject to requisition in time of war. This service was maintained from 1865 to 1876. Under the same act of 1865, a 10-year contract was made with the Pacific Mail Steamship Company for a monthly mail service from San Francisco to Japan and China. For a while this service was required to be via Honolulu, but that stipulation was later changed, and a contract was made with the California, Oregon and Mexican Line for carrying the mail to Honolulu. The Pacific Mail Steamship Company was paid \$500,000 a year for the monthly mail service to the Orient, and in 1872 the Company secured a second contract for another monthly service for which it obtained an additional \$500,000; but three years later the second contract was canceled, because it had been secured by corrupt means. In 1877, all payments under the postal subvention Act of 1865 were stopped. The total sum paid under contracts made in consequence of the Act of 1865 was about \$6,500,000. The Act had brought about the establishment of a trans-Pacific steamship line composed of vessels of American construction and operation, a line that was able to continue in operation after 1877, without direct government assistance, until 1915, when it went out of service.

The tonnage of American shipping in the foreign trade was practically the same in amount in 1877 as it had been in 1865; but shortly after 1877 a steady decline set in that reduced the total from somewhat more than a million and a half to less than a million tons by 1890, when Congress again sought to help the American marine in the overseas trades by providing for what was thought to be liberal ocean mail-carrying contracts, but which, as subsequent experience showed, produced no more successful results than had been secured from previous mail subsidy legislation. By the Act of March 3, 1891, Congress authorized the Postmaster-General to make contracts of five to ten years duration with companies operating iron or steel vessels of Ameri-

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can construction and registry to carry the ocean mails over designated routes. Vessels of 8,000 or more tons and maintaining a speed of 20 or more knots an hour could be paid four dollars per mile for the outward trip by the shortest practicable route; vessels of the second class of not less than 5,000 tons and 16 or more knots were to be paid two dollars per mile; those of the third class of not less than 2,500 tons and 14 or more knots, one dollar per mile; and those of the fourth class not less than 1,500 tons and 12 or more knots (which might be of wood or iron or steel), two-thirds of a dollar per mile. Vessels of the first three classes were required to be such as could be converted into naval auxiliaries, and the vessels of all four classes were to take on as a cadet or apprentice one American boy, under 21 years of age, for each thousand gross tons of the ship's registered tonnage. These apprentices were to be taught the duties of seamanship, were to rank as petty officers, and were to be given reasonable pay.

There were relatively few contracts made under the terms of the Act of 1891. Of the annual payments made—sometimes amounting to more than a million dollars—nearly two-thirds usually went to the American Line of the International Mercantile Marine Company, whose vessels qualified for the four dollars per mile payment for the relatively long distance from New York to England. The next largest payment went for the transportation of mail across the Pacific by the Oceanic Steamship Company whose vessels being of the second class received two dollars per mile for the outward voyage. The number of contracts under the Act of 1891 varied from time to time. For a few years there were nine in force; after 1914 there were five contracts of which three were for mail transportation, by vessels of the third and fourth classes, to Mexico and South American countries on the Caribbean. Soon after the World War, the mail-contract payments under the Act of 1891 became small. October 12, 1920, the contract with the American Line expired and was not extended. Other contracts expired in 1922 and were not renewed. For the 32-year period, 1891 to 1923 inclusive, the total payments on mail-carrying contracts under the Act of 1891 amounted to \$29,630,929, of which \$15,597,765 was received by

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the American Line for its service to Southampton, England, and Antwerp, Belgium, and \$4,854,104 by the Oceanic Steamship Company for its service from San Francisco to Sydney, Australia. American steamship companies were not able to provide the services required for the frequent and rapid transportation of ocean mail from the United States to different parts of the world, and the Postmaster-General accordingly made increasing use of the service of non-contract carriers. Moreover, for some years after the World War, the Government, through the United States Shipping Board and the Fleet Corporation was operating numerous steamship lines, and much mail was carried by those lines.

Two measures were adopted by Congress, which proved to be but idle gestures, one before the World War and one at its close, to give American vessels an advantage over foreign-flag ships as carriers of the imports and exports of the United States. The Tariff Act of October 3, 1913, made a tentative effort to aid American shipping by reviving the policy of discrimination in import duties. One subsection of the law provided that:

A discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

By treaties that had been entered into with most maritime nations, the United States had agreed not to levy discriminating duties. Although the proposal was to treat all foreign nations alike, there would have been a discrimination in favor of American ships as against the vessels of each foreign country; and it is not surprising that this provision of the Tariff Act of 1913 was held to be invalid by the Supreme Court. Had it been held to be valid, its enforcement would doubtless have caused foreign countries to retaliate, and the net result would have been injurious both to the foreign commerce and to the shipping of the United States.

An attempt to remove the obstacles to the adoption of a policy of discrimination in import duties to aid American shipping in

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the foreign commerce of the United States was made by Congress when it included Section 34 in the Merchant Marine Act of 1920. By this section, the President was "authorized and directed" by Congress to give foreign governments notice of the termination of the provisions of treaties "which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels." President Wilson did not do as he was "directed," his view being that, if he were to carry out the mandate of Congress, he would cause the United States to violate its treaties. Moreover, President Wilson took the position that the Constitution vests in the President the power to negotiate treaties or amendments thereto, and that the President in the exercise of that power is not subject to the orders of Congress. The successors of President Wilson have held the same view, and Section 34 of the Act of 1920 has been a dead letter.

The most definite and effective government assistance given to American shipping from the eighteen-eighties to the World War was the aid to shipbuilding that resulted from the naval policy of the United States. During those three decades the United States Navy was reconstructed and enlarged, and most of the naval vessels were built in the private shipyards of the Atlantic and Pacific seaboards. Shipbuilders were thus enabled to modernize and expand their plants, and several important new yards, such as those at Newport News, Camden, and Fore River, were established. The Government's orders for vessels were distributed among the shipyards on the two seaboards, thus enabling the several shipbuilders to develop a body of skilled mechanics and a corps of naval architects.

The growing volume of shipping employed on the Great Lakes and coastwise in the domestic commerce of the United States provided much work for the yards located on the Lakes and the seaboard, but, as it was not generally profitable to invest money in ships to be operated on most foreign trade routes in competition with foreign vessels, and as the costs of ship construction were higher in the United States than in some other countries, the American shipyards, in the absence of a "construction differential subsidy," received but few orders for vessels to be

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operated in the overseas trades. The number of American vessels registered for the foreign trade in 1904 was about the same as the number for 1894, and there had been no gain in total tonnage; and while, during the decade ending with 1914 the number of registered vessels doubled, there was only a 20 per cent gain in the total tonnage. Then came the World War and the consequent sudden and imperative demand for more cargo carriers, army transports, naval auxiliaries, and naval vessels.

### GOVERNMENT AID TO THE MERCHANT MARINE FROM THE WORLD WAR TO 1928

In 1910, the total gross tonnage of American ships registered for the foreign trade was only 782,517 tons. Five years later, the total was two and one-third times that of 1910; and in 1920 the registered tonnage was more than 10 times what it had been a decade earlier. Such, statistically stated, was the temporary effect of the World War upon the volume of shipping available for use in the foreign commerce of the United States. It is hardly necessary to state that the transportation requirements of the foreign commerce of the United States could afford employment to only a part of the available supply of vessels. The ships had been built by the Government to meet the extraordinary need created by the war; and when the war ended and when, two years later, the wartime shipbuilding program was completed, the Government found itself in possession of more than twice as many vessels as could be used in the ocean carrying trade of the United States, even if their profitable operation in competition with foreign-flag vessels were possible. Great Britain and some other countries also had a surplus of vessels; and all countries were eager to reestablish and develop their shipping and commercial activities.

It became manifest soon after peace was restored that but a very small share of the Government's large fleet could be sold to American companies for operation in the foreign trade; and that but a relatively small portion could be sold, even at a very low price, to steamship companies who were engaged in domestic commerce or who desired to begin operation of vessels in the

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coastwise service. It seemed necessary for the Government to decide which of two alternatives to adopt—whether to dispose of by far the greater part of its fleet for scrap or to retain at least a substantial portion of its vessels, and to operate them either directly or through its agents, over the many routes by which the commerce of the United States with different parts of the world is carried on. The latter alternative was chosen by the United States Shipping Board, whose broad powers under the Shipping Act of 1916 were further widened and strengthened by Congress in adopting the Merchant Marine Act of 1920.

The wartime construction program carried out by the Government from 1917 to 1921 resulted in a large surplus of vessels of the size and speed of cargo carriers. Some larger combination cargo and passenger vessels were built by the Government and have been successfully operated by the Munson and Dollar lines and other purchasers; but their number was too small to meet the need for combination vessels in the overseas services of the American Merchant Marine. The scarcity of large passenger, mail, and express carriers, on the high seas under the American flag, was even more marked; and although there was a surplus of American shipping, as a whole, the merchant marine of the United States was not well-balanced, and was not in a position to engage successfully in the varied transportation services connected with international commerce.

The aim of the Government since the war has been twofold: (1) to establish and for a period to maintain steamship lines connecting the Atlantic, Gulf, and Pacific ports of the United States with the main commercial centers of the world, and then (2) to sell, at small cost, to American companies for further operation, the lines thus established. The purpose of the sale of such ships as could be disposed of was to enable the Government to withdraw from the ownership and operation of vessels and thus to make its relation to the merchant marine one of regulating and aiding private enterprise. This aim has not yet been fully realized, but the Government is nearly out of the business of owning and operating merchant vessels on the ocean.

The general American mercantile marine situation following the World War was not favorable for American shipbuilders.

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The demand for new cargo carriers in the coastwise and intercoastal trades was kept low by the superabundance of freight vessels that could be purchased from the Government for a small fraction of their original cost. Some high-grade combination passenger and cargo vessels were built for companies operating in the coastwise and intercoastal services; there were many additions made to the domestic tanker fleets; ore and coal carriers, especially on the Great Lakes, were increased in number; and there was the work of remodeling vessels, especially those that steamship companies bought from the Government. The purchase of new vessels and the remodeling of vessels in service were also aided by government loans to which reference will be made in the following paragraph; but the American shipbuilding industry as a whole was not in a strong position at the beginning of the prolonged business depression that came upon the country near the close of 1929. The effects of the depression greatly emphasized the importance of adopting a policy of such definite and effective government assistance to domestic shipbuilding and the merchant marine as would assure adequate future provision of the shipping needed for the development of the country's foreign commerce and for supplementing the Navy in times of emergency.

The need for financial aid by the Government to those ordering ships to be constructed in the United States and to those having vessels remodeled in American yards was recognized by Congress when it adopted the Merchant Marine Act of 1920, Section 11 of which authorized the Shipping Board to set aside from the receipts, obtained from the sale of government vessels, revenues sufficient to build up over a period of five years a construction loan fund not exceeding 25 million dollars. From this fund loans, up to two-thirds of the cost, could be made to those having vessels constructed or reconditioned in American shipyards. An act passed in 1924 extended, for another five-year period, the time during which the Shipping Board could allot revenues to the construction loan fund, and the rates of interest then fixed were  $5\frac{1}{4}$  per cent upon funds advanced for vessels in the coastwise trade, and  $4\frac{1}{2}$  per cent for vessels in the foreign trade, except that the rate should be  $5\frac{1}{4}$  per cent when the vessels were

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inactive. Further amendments to the Act of 1920 were made by Congress in 1927 and 1928. The amendment of 1927 removed the five-year limitation upon the allotment of revenues to the loan fund and provided that the fund might be built up to 125 million dollars.

The results produced by the construction loan fund provided by the Acts of 1920 and 1924 were small. Loans for the construction of only 15 vessels of 101,511 gross tonnage had been made up to the time of the adoption of the Act of March 4, 1927; and that Act, had it remained unchanged and unsupplemented, would hardly have accomplished very much. In the United States and in other countries there were more ships than could find employment. There was a surplus tonnage of shipping in operation in both the domestic and foreign commerce of the United States. Many lines, with government support, were being operated for the Shipping Board which also had in its possession a large number of idle vessels that it was eager to sell at a low price and upon easy terms of payment. It was a period during which as large use as possible was being made of some of the vessels that had been built by the Government; it was not a time when ships were being ordered to add the up-to-date types of vessels needed to produce a well-balanced and efficient American merchant marine. For business in general it was a prosperous period, but, for the private shipyards, conditions were not favorable, even though they participated, along with the Navy Yards, in constructing vessels for the United States Navy.

It was the purpose of Congress to have the Government engage only temporarily in the business of ocean transportation, and to do so in such manner as to assist private enterprise in taking up the business upon an enlarged scale. The first section of the Act declared it to be necessary in the interest of the Navy and the foreign commerce of the United States to have an "adequate merchant marine of the best equipped and suitable types of vessels . . . ultimately to be owned and operated privately by citizens of the United States"; and by Section 5 of the law the Shipping Board was "authorized and directed to sell as soon as practicable, consistent with good business methods," all of the vessels that were acquired by the Board. Section 7 of the Act



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directed the Board to determine what steamship lines were needed by the foreign commerce of the United States and what vessels and sailings were required by each line for the performance of its service. The Board was then to offer to sell or charter vessels to citizens of the United States "who agree to establish and maintain such lines upon such terms of payment and other conditions as the Board may deem just and necessary," and, if no citizens can be secured to establish and maintain a steamship line that has been found to be needed, "The Board shall operate vessels on such line until the business is so developed that the vessels may be sold on satisfactory terms," or until it shall appear "that such line cannot be made self-sustaining." To assist the lines the Postmaster-General was authorized to make contracts with them for the carriage of the mail at a price to be agreed upon by him and the Shipping Board.

For a short time after the World War ended there was a large volume of foreign commerce; but, as always happens to post-war trade, there followed (in 1921 to 1922) a sharp temporary decline in export and import shipments. Promptly after the passage of the Merchant Marine Act of June 5, 1920, the Shipping Board, through the Emergency Fleet Corporation, put in operation as many as possible of its ships. In June, 1921, the Shipping Board had contracts with 97 managing agents who were operating 794 vessels of which approximately 400 were in line services to all the major commercial regions of the world. About 300 ships were being chartered for tramp services. During the following year, the temporary recession in business caused a large falling off in the number of Shipping Board vessels in operation, especially in the number operated in tramp services and in the number of active tankers. At the close of the fiscal year ending June 30, 1922, the Shipping Board vessels in operation numbered 359 "which served 78 trade routes to various parts of the World." Of this total 21 were combination passenger, mail, and cargo vessels that were being operated over five routes, two across the North Atlantic, two across the Pacific, and one to the east coast of South America.<sup>3</sup> In addition to the 359 vessels upon trade

<sup>3</sup> The figures here presented are taken from the Sixth Annual Report of the United States Shipping Board, June 30, 1922.

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routes, there were 22 tankers in service, of which 19 were being operated for the Shipping Board and three were chartered to independent companies, while 68 of the Board's 90 tankers were temporarily idle.

These few details are sufficient to show that the Shipping Board, through the Emergency Fleet Corporation, and the managing agents of the Corporation, had engaged extensively in ocean transportation. This had been done primarily for the purpose of establishing and developing ocean lines over many trade routes, with the hope and expectation of disposing of such lines to private steamship companies. The other object of the Shipping Board was to find employment for a part of its vast fleet, such employment as would promote the development of the foreign commerce of the United States. The number of vessels put in operation by the Government seems large, but they comprised only a small part of the 1,707 vessels of all descriptions in the possession of the United States Shipping Board in 1922, of which total 1,449 consisted of steel vessels with steam-power.

Having taken the first step required of it by the Merchant Marine Act of 1920—that of selecting the ocean trade routes of importance to the foreign commerce of the United States and of beginning the operation of line services upon those routes—the Shipping Board, following 1922, was confronted with the difficult task of finding purchasers for the steamship lines it had established. While engaged extensively in ocean transportation the Government could not entirely avoid being a competitor of such private steamship companies as had previously been in business and of such new companies as might enter the business. It was essential that the Government should withdraw from the field as soon as practicable, if it was to be of real assistance in building up a merchant marine “owned and operated privately by citizens of the United States.” This was realized by the Shipping Board which was zealous, during the remaining decade of its existence, in seeking to get the Government out of, and private enterprise into, the ocean shipping business.

The degree of success attained by the Shipping Board in performing its difficult task may be indicated by referring to what

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had been accomplished up to the time of the adoption by Congress of the Merchant Marine Act of 1928 (approved by the President May 22nd), that both amended the Merchant Marine Act of 1920 and provided for much more liberal mail-carrying contracts than had previously been authorized. In its annual report for the year ending June 30, 1928, the Shipping Board states that "all told, the board has owned and controlled since 1917 a grand total of 2,536 vessels of all types, aggregating 14,706,217 dead-weight tons."<sup>4</sup> The statements are also made that "since 1921, the board has sold to American citizens 1,164 ships, representing 5,360,144 tons, for \$90,620,576.47, including 15 established ship-line services disposed of on the basis of guaranteed operation for a fixed number of years," and that "at this writing [June 30, 1928] the board still possesses 708 ships, 253 in active operation and 505 in the laid-up fleet." Of the 253 vessels "in active operation," 23 were temporarily inactive at the date of the reports and 230 were being operated in 47 services by the 29 "managing agents" of the Merchant Fleet Corporation, which title had been given the previous Emergency Fleet Corporation. It will be noted that there had been a large decrease since 1922 in the number of services or trade routes, of managing agents, and of vessels operated. This was due to the consolidation of some of the services, to the sale to private companies of some of the steamship lines that had been established by the board, and to the sale of a large number of vessels.

The lines or services established or authorized by the Merchant Fleet Corporation were operated under contract by managing agents who took no financial risk, but received a stipulated percentage of the freight or other revenues of the vessels. If expenses exceeded the receipts, the loss was borne by the Fleet Corporation, and the annual losses were relatively large. In 1924, the losses from operation had been 41 million dollars. By 1928,

<sup>4</sup> The Shipping Board's figures are for dead-weight tonnage. The merchant marine statistics published by the Bureau of Marine Inspection and Navigation of the Department of Commerce give the gross tonnage, registered and enrolled, of shipping. For freight vessels the dead-weight tonnage is greater than the registered or enrolled tonnage. For passenger and combination freight and passenger vessels the dead-weight tonnage *may* be less than the registered or enrolled tonnage.

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this total had been reduced to \$16,279,000, partly as the result of the sale of several passenger and cargo lines and partly by improvements in service.

Such, briefly stated, was the situation eight years after the enactment by Congress of the Merchant Marine Act of 1920. The Shipping Board was still in possession of a large number of vessels; it was still operating many of them; and all the vessels in its possession, in spite of the expenditures that had been made for reconditioning vessels for sale or for government operation, were each year becoming more and more obsolescent as compared with the vessels of Great Britain, Germany, Japan, and other countries whose merchant marines were being modernized and made more efficient by new construction.

With a view to capitalizing popular interest in the American merchant marine and for the purpose of stimulating the enactment of needed legislation, the Shipping Board, in January, 1928, "called a conference of private American steamship owners, operators, and builders in order to ascertain their views and on the basis thereof formulate a series of recommendations to Congress." In the resolutions adopted by this conference the statement is made that "our overseas merchant marine is being rendered obsolete by the rapid march of science and invention, which has completely revolutionized the manner of vessel propulsion since our ships were built." Congress was urged to take prompt action, the recommendation being that "this action should look toward reconditioning some of the present fleet, and should otherwise provide inducements having in view its early transfer to private ownership under conditions assuring continuance of operation."

The response of Congress to the recommendations of the Shipping Board and the shipping interests was the passage of the Jones-White Act (the Merchant Marine Act of May 22, 1928), the main provisions of which may be briefly stated, with a summary of the results accomplished by the Act.

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### GOVERNMENT AID TO THE MERCHANT MARINE BY THE MAIL SUBSIDY ACT OF 1928

Congress sought to put the construction, ownership, and operation of American vessels upon a better basis by the enactment of the Merchant Marine Act of 1928. Whether the framers of the Act were as wise regarding the method by which their aim could be or should be accomplished as they were zealous in their effort to give substantial and effective aid to American ship-building and maritime enterprise is a question concerning which there may be differences of opinion. The amount of aid given by the Act of 1928 was large; possibly it was as great as ever need be given to assure the future success of the American Merchant Marine, but the expenditures were mainly for subsidies for the carriage of the ocean mail and thus did but little to overcome the handicaps of higher construction and operating costs that hamper the development of an adequate and well-balanced American merchant marine.

The general purposes sought to be accomplished by the Merchant Marine Act of 1928 were to bring about, by the granting of liberal mail subsidies and construction loans, the construction in the United States, and the addition to the American merchant marine, of passenger liners and passenger-cargo vessels, and, by means of construction loans, to enable vessel owners in general to modernize and recondition their ships. The Act provided for the increase of the revolving construction loan fund to a maximum of 250 million dollars, by crediting to that fund receipts from sales of government vessels and, if necessary, by congressional appropriation. Loans equal to three-fourths of their outlay could be made to those having vessels constructed or reconditioned, such loans being repayable over a period of 20 years. The interest rates on such loans, as provided in the Act of 1928, proved to be lower than the framers of the law intended. The law provided that the rate charged on a loan should be the lowest rate paid by the Government on any obligation incurred subsequent to April 6, 1917, and outstanding at the time the loan to the shipowner was made. Subsequent to the enactment of the law, the Government borrowed money on some short-term notes

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at as low a rate as one-fourth of one per cent; and the Shipping Board, by the interpretation given the statute by the Secretary of the Treasury and the Attorney-General, was obliged to make some loans from the construction loan fund at the lowest interest rate paid by the Government on its short-term notes. This situation was corrected in 1931, when Congress amended the Act of 1928 by providing that the interest rate paid for loans on vessels in the coastwise trade or when inactive should be  $5\frac{1}{4}$  per cent and that the rate for vessels engaged in the foreign trade should be  $3\frac{1}{2}$  per cent. This amendment applied to loans granted after its enactment, but not to loans promised by the Shipping Board prior thereto, although the funds covered by such loan agreements were advanced subsequent to the adoption of the amendment.

Inasmuch as in the majority of cases shipping companies sought government aid for acquiring new ships or for reconditioning those in service, not only because government funds therefor could be obtained at low cost, but also for the purpose of meeting the conditions requisite to obtaining a contract for the carriage of ocean mails, it is not possible to state definitely how much of the construction and reconditioning of vessels as the result of the enactment of the Merchant Marine Act was due to its provisions as to government loans and how much was due to the liberal mail payments authorized by the law. The mail payments were made primarily to increase the revenues obtained from the operation of vessels. The construction loans made under the Act of 1928 were mainly to assist in bringing into existence new combination passenger and cargo vessels of the size and speed required of mail carriers. Four-fifths of the total loans (\$129,707,366) authorized up to September, 1934, both for the construction of new vessels and for the reconditioning of other ships, was to aid in the construction of 32 new combination vessels; and the loans for reconditioning were mainly for combination vessels which were presumably of the mail-carrying type. During this period, construction loans were made for nine tankers, and for two, but only two, freighters; while 19 freighters and one tanker received loans for reconditioning. Thus the Merchant Marine Act of 1928, through its loan and mail-contract

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provisions, brought about a substantial addition to, and improvement of, the tonnage of combination passenger and freight vessels—which was and is much to be desired—but the Act but indirectly and slightly strengthened the American merchant marine as a carrier of the foreign commerce of the United States and other countries.

One part of the Act of 1928 threatened for a while to handicap the placing of the American merchant marine upon the only foundation on which an efficient and permanently successful marine can be built. The Merchant Marine Act of 1920 had sought to bring about the early retirement of the Government from the business of owning and operating ships, but the Act of 1928 provided that:

The United States Shipping Board shall not sell any vessel or line of vessels except when, in its judgment, the building up and maintenance of an adequate merchant marine can best be served thereby, and then only upon the affirmative vote of five [of the seven] members of the board duly recorded.

The Shipping Board, by the Act of 1928, was also given the power to remodel and improve the vessels owned by the Government, and was “directed to present to Congress from time to time recommendations setting forth what new vessels are required for permanent operation under the flag of the United States in the foreign trade.” However, the apparent purpose of Congress to keep the Government indefinitely in the ocean shipping business, if such really was its intent, did not prevail. There soon followed a sharp decline in the foreign trade of the United States due to business conditions at home and abroad and to the increasing efforts of many countries to develop home production and thereby to reduce unemployment and to lessen their financial obligations to foreign countries. The decrease in the domestic commerce of the United States due to business depression, and the sharp decline in the country’s foreign trade due to the economic conditions, and the financial and commercial policies of the countries of the world, created an increase in the idle tonnage of American shipping in both domestic and foreign commerce. The Shipping Board was, in consequence, urged to put an

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end to government ownership and operation as soon as possible, while business conditions made the carrying out of such a policy increasingly difficult. The Shipping Board would doubtless have disposed of the Government's vessels had it been able to do so, and it would have given greater aid to private shipowners by loans from the construction loan fund had such loans been requested. Having very limited power to regulate carriers by water, and being prevented, by misdirected legislation as well as the economic conditions that created a surplus of shipping in both domestic and foreign commerce, from doing much to improve and enlarge the merchant marine as a whole, the Shipping Board lost favor with the public and the Government. As has been stated in Chapter VIII President Coolidge recommended, and for a time President Hoover favored, the reorganizing of the Shipping Board, the transfer of its administrative functions to the Department of Commerce, and the regulation of the rates and services of carriers by water by a shipping board of three members. Later in his term President Hoover recommended that the Interstate Commerce Commission be given power to regulate the rates and services of carriers by water and that the Shipping Board be abolished. Congress delayed action until March 3, 1933, when authority was given the President to make certain changes in the administrative organization of the Government and, in accordance with the power thus given him, the President, by an order dated June 10, 1933, and effective 61 days later, abolished the Shipping Board and transferred its powers and duties under the several merchant marine and shipping acts to the Department of Commerce and thus to the Shipping Board Bureau that was organized within that Department.

While the loans made by the Government under the terms of the Act of 1928 were substantial in amount, it probably was the mail subsidies authorized by the Act that did most to bring about the construction or reconditioning of the vessels upon which a large share of the loans were made.<sup>5</sup> The maximum contract compensation payable for carrying the ocean mails was made

<sup>5</sup> Consult *Transportation by Water* (1935), by E. R. Johnson, G. G. Huebner and A. K. Henry, pp. 229-233, for the account of mail subsidies payable and paid under the Act of 1928.



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large, ranging by graduation from \$1.50 per nautical mile on the outward voyage for vessels of Class 7, having a gross tonnage of not less than 2,500 tons and being capable of maintaining a speed of 10 knots per hour at sea to \$12 per nautical mile for vessels of Class 1, having a gross register tonnage of not less than 20,000 tons and a speed at sea of 24 knots. For vessels in Class 1 of greater speed than 24 knots, the Postmaster-General could grant a still higher rate of pay, "but the compensation . . . shall not be greater than an amount which bears the same ratio to \$12.00 as the speed which such vessel is capable of maintaining at sea in ordinary weather bears to 24 knots."

The mail subsidies made payable under the Act of 1928 were large. Five years after the Act became a law, 44 mail-carrying contracts had been made in accordance with its provisions, and the total amount payable under those contracts, during the 15 years from July 1, 1928, to April 15, 1943, would have been \$328,600,000, had the contracts not been canceled as of July 1, 1937 by the Merchant Marine Act of 1936. The sum paid under the terms of the mail contracts rose rapidly from \$9,304,217 in 1929 to \$29,536,733 per annum in 1935. Had American vessels in 1936 carried the mails which were carried under the mail contracts, on a non-contract basis of payment, they would have been paid 80 cents per pound for the first-class mail and eight cents per pound for other mail and parcel-post packages, and the total amount received would have been \$3,407,937 or \$24,639,707 less than they actually obtained. Such was the subsidy paid to the part of the American merchant marine that received government aid.

The results obtained from the Merchant Marine Act of 1928 were not what had been hoped for. The merchant marine, it is true, had suffered from adverse conditions after 1929. The depression in business was well nigh world-wide and international commerce, which, in any event, would have fallen off, was abnormally decreased by the barriers which many countries placed against imports in order thereby to increase domestic production and employment and to lessen international obligations. The volume of ocean transportation was greatly reduced. The merchant marines of all countries suffered. It was a time when the

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American merchant marine especially needed practical and effective government aid, assistance that would be helpful to shipbuilding and the merchant marine as a whole, instead of being limited almost entirely to aiding the construction and operation of vessels that could meet the requirements for carrying the mails under the mail subsidy provisions of the Merchant Marine Act of 1928.

The Government, through the Merchant Fleet Corporation of the Shipping Board Bureau of the Department of Commerce—to which Bureau the powers and duties of the Shipping Board had been transferred in 1933—wisely continued its effort to dispose of its vessels and bring its ship-operating activities to an end. In 1936, the Fleet Corporation had four managing operators who were maintaining services over five lines with a total of 36 vessels. The basis of compensation to operators had been changed from a percentage of gross traffic revenues to a lump sum per voyage, with some resulting economy; but the operation of the five lines involved a loss of \$1,126,470 to the Merchant Fleet Corporation. Moreover, the Corporation, on June 30, 1936, had a "reserve" fleet of 197 idle vessels to be maintained. Some ships are sold each year, a part of them for scrapping, a part of them for operation. Some vessels in this reserve fleet will be sold for scrap-iron, others will be reconditioned for emergency use; their first cost has already been written off as a war expense.

The threefold task of the Shipping Board Bureau was to further the withdrawal of the Government from the business of owning and operating vessels and other shipping facilities, to administer and enforce the regulatory provisions of the Shipping Act of 1916 and the Merchant Marine Acts of 1920, 1928, and 1933, and to seek to bring about the adoption of a policy of government aid to shipbuilding and the merchant marine that would be more helpful than was the policy embodied in the Merchant Marine Act of 1928. The Shipping Board Bureau, the Secretary of Commerce, and the President recommended construction-differential subsidies by the Government and operating-differential subsidies to increase the number of ships, and their recommendations were embodied in the Merchant Marine Act of 1936,

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by which the functions of the Shipping Board Bureau were vested in the present Maritime Commission.

### THE MERCHANT MARINE ACT OF JUNE 29, 1936

The Merchant Marine Act of 1936 is a lengthy statute the provisions of which are subdivided among nine "titles," the first of which contains the "declaration of policy" that is quoted at the beginning of this chapter. Title II provides for the administration of the Act by a United States Maritime Commission of five men to be appointed by the President. To this Commission is transferred "all the functions, powers and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and the amendments to those Acts." The powers to be exercised by the Commission are set forth in detail.

Title III of the statute contains new and important legislation concerning American seamen, it being provided that:

The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings, to incorporate, in the contracts authorized under titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. After such minimum manning and wage scales and working conditions shall have been adopted by the Commission, no change shall be made therein by the Commission except upon formal complaint, public notice of the hearing to be had on such complaint, and a hearing by the Commission of all interested parties, under such rules as the Commission shall prescribe.

It is also stipulated in Title III that "all licensed officers of vessels documented under the laws of the United States . . . shall be citizens of the United States, native born or completely naturalized," and that cargo vessels for which a construction or operating subsidy has been granted shall have crews composed entirely of American citizens. In the case of passenger vessels that have been aided, 80 per cent of the crew, during the first year after

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the effective date of the Act, shall be American citizens, the percentage to increase 5 per cent per annum until 90 per cent of the crew are American citizens.

Title IV provides for the termination, by June 30, 1937, of each ocean mail contract, the Commission being given authority "to adjust and settle all the rights of parties under such contract" and to substitute therefor the government aid obtainable under the provision of the new statute. If the holder of an ocean mail contract is not satisfied with the compensation allowed him by the Commission, he may bring suit against the United States in the United States Court of Claims, such suit to be brought before January 1, 1938.

Title V makes provision for a liberal "construction differential subsidy." When an application is made for such a subsidy, it may be approved if the Commission finds that:

(1) The service, route, or line requires a new vessel of modern and economical design to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) the plans and specifications call for a new vessel which will meet the needs of the service, route, or line, and the requirements of commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable it to operate and maintain the proposed new vessel in such service, or on such route or line, and to maintain and continue adequate service on said route or line, including replacement of worn-out or obsolete tonnage with new and modern ships; and (4) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act.

A person or company desiring to have a vessel reconditioned or to have a new vessel constructed for operation in the foreign commerce of the United States may apply to the Maritime Commission for aid. The applicant is to submit plans and specifications for the desired vessel. The plans are then submitted to the Navy Department to decide whether the vessel will be suitable for conversion into a naval auxiliary, or what changes in the plans will be needed to make the vessel suitable therefor. The plans having been made acceptable to the Maritime Commission and the Navy Department, the Commission may secure from American shipbuilders bids for doing the work and may enter into a contract

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with the builder whose bid is accepted. When the work is done, the Commission is to turn the vessel over to the applicant, and the price charged the applicant is to be the amount that it would have cost to have had the work done in a foreign shipyard. The statute provides:

That the construction differential approved by the Commission shall not exceed  $33\frac{1}{3}$  per centum of the construction cost of the vessel paid by the Commission (excluding the cost of national-defense features as above provided), except in cases where the Commission possesses conclusive evidence that the actual differential is greater than that percentage, in which cases the Commission may approve an allowance not to exceed 50 per centum of such cost, upon the affirmative vote of four members, except as otherwise provided in subsection 201 (a).

The act would require a payment by the purchaser to the Commission, upon delivery of the vessel, of 25 per cent of the amount to be paid by the Commission to the American shipbuilder, less the cost of the national defense features of the ship. The remainder of the purchaser's cost is to be paid by the owner of the vessel in not more than 20 annual amortization instalments, the interest on unpaid instalments being  $3\frac{1}{2}$  per cent per annum.

If the applicant for a government subsidy prefers to finance the proposed "vessel according to approved plans and specifications rather than purchase the same vessel from the commission" under the terms above stated, he may submit his plans and the competitive bids he has received for doing the work to the Maritime Commission, and, when the plans and a bid have been approved by the Commission, the applicant may make a contract with the shipbuilder. The Government will then become a party to the contract and pay the shipbuilder the amount of the construction-differential subsidy authorized by the Act.

The proposed act would provide that bids from the Pacific coast shipyards of the United States may be 6 per cent higher than like bids from Atlantic coast yards provided the vessels upon which the work is done are operated in the foreign trade from a Pacific coast port of the United States.

A provision of the law that may have important results is that,

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when the Commission aids in the construction of a new vessel to replace an obsolete or inadequate vessel, the Commission may purchase such replaced vessel at a fair valuation. The vessel thus purchased by the Commission may either be scrapped or be sold to citizens of the United States or to aliens, the purchasers being required to guarantee that the vessel shall not, for a period of 10 years, be operated in the foreign commerce of the United States in competition with vessels of American registry.

Among other detailed provisions of the proposed legislation is one limiting to a maximum of 10 per cent the profits that may be made by a shipbuilder for work subsidized by the Government. In carrying out this provision, the Government is to inspect and pass upon the expenses charged to construction, and is not to allow salaries of more than \$25,000 per annum to be considered as a part of the expenses.

Title VI of the statute provides for the payment by the Maritime Commission of a liberal "operating-differential subsidy" for the operation of American vessels in the foreign trade of the United States in competition with vessels under foreign flags. In approving an application for such a subsidy, the Commission must be convinced—as in the case of an application for a construction-differential subsidy—that: (1) the service to be aided is "required to meet competitive conditions or to promote the foreign commerce of the United States"; (2) the applicant owns or can and will build the vessel or vessels required to meet competitive conditions; (3) the applicant possesses the necessary financial and other qualifications; and (4) that "the granting of the aid applied for is necessary to place the proposed operation of the vessel or vessels on a parity with those of foreign competitors."

If the application is granted, the Commission may enter into a contract with the applicant, the contract involving (1) the payment by the Government of the operating differential subsidy determined by the several provisions of the act, and (2) the operation by the applicant, for a period not exceeding 20 years, of such vessels and services as the contract calls for, "unless the "Commission finds that it is in the public interest to grant such

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financial aid [for more than twenty years] . . . and enters a special order thereon."

The amount that the Maritime Commission may pay as an operating-differential subsidy is the difference between the cost of performing a specified service with American vessels instead of with foreign-flag vessels. The Commission may also take account of the amount of government aid paid to the competitors of an American vessel line. Subsidies are not to be paid for the operation of vessels more than 20 years old, unless the Commission finds such operation to be in the public interest, and when such vessels are aided the Commission must state the reason therefor in its annual report.

Every contract made by the Maritime Commission for the payment of an operating subsidy shall be granted subject to the following conditions:

1. The amount payable to the contractor "shall be subject to review and readjustment from time to time, but not oftener than once a year."

2. The Commission may reduce the compensation "for any periods in which the vessel or vessels are laid up."

3. The Commission may "determine that a change in the service, route, or line, which is receiving an operating differential subsidy . . . is necessary . . . and may make such change upon readjustment of payments to the contractor."

4. If the contractor who is receiving an operating-differential subsidy finds that he cannot operate with a reasonable profit on his investment, he may apply for, and the Commission may grant, a modification or rescission of his contract.

5. If at the end of any five-year period the contractor's profits, after providing for depreciation of property, are found to exceed 10 per cent per annum upon his investment, he shall pay one-half of the excess profit to the United States.

6. The contractor shall conduct his operations "in the most economical and efficient manner, but with due regard to the wage and manning scales and working conditions prescribed by the Commission."

During the period that has elapsed since its appointment, the

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Maritime Commission has, in connection with its numerous other tasks, been investigating the costs of operating specific services by foreign vessels and by American vessels over the routes of importance to the foreign commerce of the United States. With the cancellation of the mail subsidy contracts, July 1, 1937, government aid under the terms of the Merchant Marine Act of 1936 necessarily began. What the results of the aid thus granted will be, can only be determined after a few years' experience.

Title VII provides, in substance, that if the Act of 1936 does not bring about the creation of an adequate American merchant marine under private ownership and operation, the Maritime Commission may have new ships constructed, or may have vessels reconstructed; and that the vessels thus acquired may be operated by the Commission or may be chartered or sold to private operators or owners. This makes possible a return to the policy of government ownership and operation of vessels that was included in the Merchant Marine Act of 1920. Such a policy, as a temporary measure, seemed to be made necessary by the situation following the World War. The only possible justification for the return to such a policy in the future would be the inability of private enterprise to provide such a merchant marine as is made necessary by the requirements of national defense. Government ownership and operation of merchant shipping is to be avoided. When adopted as a temporary measure, it does not prepare the way for private enterprise, but narrows the opportunity and lessens the incentive of private initiative.

Title VIII of the Act of 1936 sets forth numerous details as to the provisions to be included in the contracts that may be made by the Commission under Titles VI and VII of the law. One of the provisions is that "no director, officer or employe . . . shall receive from any contractor" that has been aided by the Commission, "a total compensation for his services of more than \$25,000 per annum." The main provision of Title IX, which is devoted to "miscellaneous provisions," is the one authorizing the Commission to requisition any American vessel during a national emergency declared by the President. The owner of a vessel requisitioned shall either be paid a fair price for the vessel or be given a fair compensation for its use. A vessel taken and used



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without being purchased shall be returned in as good condition as it was when it was requisitioned.

The Merchant Marine Act of 1936 is sound in principle. It substitutes for the ineffective ocean mail subsidies a kind of aid that should be helpful to American shipbuilding and to the American merchant marine in the foreign trade. The results accomplished will depend upon the ability of the Maritime Commission to administer the Act successfully and efficiently. It will be a difficult task whose accomplishment will require time.

### GENERAL CONCLUSIONS

The general conclusions that may be drawn from the foregoing discussion of government aid to American shipbuilding and to the American merchant marine in the foreign trade may be briefly stated. The vessels now employed in the world's commerce can be built and equipped at less cost in foreign countries than in the United States; and such vessels can be operated at less expense under foreign flags. These and other factors brought about the decline experienced by the American Merchant Marine in the foreign trade for a half century following the American Civil War.

The large ship construction program carried out by the United States Government to meet the emergency created by the World War added greatly to the tonnage of vessels available for service in the domestic and foreign commerce of the United States, but the conditions that soon developed after the World War were not favorable to the profitable operation in the foreign trade of vessels under the American flag. The Government could find purchasers for but a small share of its large fleet, and the vessels bought by private companies were mainly for operation in domestic commerce.

The conditions for profitable private ownership and operation of American vessels in the foreign trade of the United States being adverse, the Government, by establishing and operating a large number of steamship lines and offering to sell to American citizens at a very low price its vessels and the lines that had been established and built up, sought to create a national mercantile

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marine that would be permanent and would be developed in the future when "owned and operated under the United States flag by citizens of the United States." Government operation was probably justifiable as a temporary measure; but it did not and could not prepare the way for the profitable ownership and operation of vessels of American construction in the foreign trade by unaided private steamship companies. The obstinate fact that American construction and operation costs of vessels were greater than foreign costs caused the tonnage of American shipping in the foreign trade to decline year by year after the World War. The rate of decline was made slower by the policy pursued by the Shipping Board, but the decline persisted.

Congress sought to place the American merchant marine in the foreign trade upon a better footing by adopting the Merchant Marine Act of 1928. The construction and reconditioning of vessels was aided by liberal government loans therefor; and largely increased pay was given to a relatively large number of American steamship companies for carrying ocean mails under contracts made possible by the Act. While the assistance thus given was of help by increasing the number of passenger and mail ships constructed, or reconditioned, and placed in service, the Act of 1928 but partially met the needs of the merchant marine. This was due in part to the world-wide business depression that cut down production and that placed extraordinary restrictions upon international trade; but, had business conditions been favorable, the Act of 1928 could have only partially succeeded in accomplishing the purpose for which it was enacted.

Government aid to an American-built merchant marine operated in the foreign trade, to be really effective, must offset the higher cost of American, as compared with foreign, ship construction, so that the American shipowner will be on a par with his foreign competitor as regards capital invested; and government aid, to accomplish its purpose, must also cover the difference between the cost of operating American and foreign vessels of like kind in the performance of like services.

The plan to be followed by the Government in building up a merchant marine to be owned and operated by American steam-

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ship companies is: (1) to determine upon what trade routes it is desirable to have an American steamship line operated and what class of vessels are needed to perform the service that will be helpful to American commerce; (2) to make it possible for an American company to place in service American ships, of the kind needed, at no greater outlay of capital than would be required to obtain the same kind of ships of foreign construction; (3) to determine the cost of efficient operation of a specified service, upon each of the selected routes, by the use of vessels under the United States flag, and the cost of operation incurred by such foreign company or companies as are or will be competitors of the American steamship line; and (4) for the Government to make contracts with American companies for performing, for a specified period, the services found to be needed, each company to receive a government subvention or subsidy equal to the difference between the operating costs of the American company and the costs that are incurred by its foreign competitor for the performance of like services.

This general plan, with necessary detailed specifications as to how it shall be carried out, and with appropriate safeguards against misuse of public funds, is the one contained in the measure that was enacted by Congress in 1936. The Merchant Marine Act of 1936 is based upon correct principles. By its enactment Congress has adopted a policy of government aid to American shipbuilding and maritime interests that should have been adopted much earlier.

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## CHAPTER XVIII

### GOVERNMENT WATERWAYS POLICY: III. GOVERNMENT AID TO INLAND WATERWAYS

WHEN the Government's relation to the American merchant marine is referred to, one ordinarily thinks only of the vessels engaged in international commerce; but of the total tonnage of shipping under the American flag—14,676,128 gross tons in 1937—only 26.6 per cent is registered for the foreign trade, while more than seven-tenths of the tonnage is enrolled for service in the domestic commerce of the United States. Two-thirds of the vessels enrolled for domestic commerce are operated in the coastwise and intercoastal services, while most of the remaining third of the enrolled tonnage is employed on the Great Lakes. Many enrolled vessels which are of different types for different services, are employed on rivers and canals while many wood and steel barges, enrolment of which is not required, are also used in river and canal transportation.

Inasmuch as ships of foreign construction or registry are not allowed to engage in the domestic commerce of the United States, more than two-thirds of American shipping does not have to compete with foreign-flag vessels, and thus does not need the kind of government aid that must be given the American merchant marine, if it is to hold its own and develop successfully in competition with the merchant shipping of foreign countries. Government aid of another kind, however, must be given, in order to make possible transportation by water on a large scale in interstate commerce. For coastwise carriers along the seaboard and on the Great Lakes, ports must be provided having harbors of sufficient area that are reached by channels of ample depth and having adequate buoys, signals, and lights. The Great Lakes must be united by waterways navigable by lake vessels. Rivers, if they are to be of service, must be canalized, and their channels must be such as can be kept in condition for use. The major component

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parts of the country's inland waterways need to be connected, so far as that is practicable, in order to further the development of a coördinated system of transportation by water.

The creation of harbors, and the work of deepening and enlarging them and their channels of approach, are tasks that the Government must perform; likewise, it is the Government that must improve, maintain, and extend inland waterways, if they are to be of service to the public as transportation facilities. Whether or to what extent these transportation facilities created at the expense of the general public should be used by all classes of carriers—common, contract, and private—free of charges, is a question that may well be raised. It will be considered in discussing the policy of the Federal Government towards carriers by water.

### POLICY OF THE STATES REGARDING INLAND WATERWAYS

Between the end of the Revolutionary War and the beginning of the Government of the United States under the Constitution, George Washington took a special interest in promoting plans—the importance of which he had emphasized as early as 1772—for connecting the Atlantic seaboard section of the country with the unoccupied “west” of his day, the wide territory beyond the Allegheny Mountains. At the close of the Revolutionary War he made a trip up the Mohawk River Valley which was the natural avenue of approach to the Great Lakes, and he continued his endeavor to interest the states of Maryland and Virginia in the canalization of the Potomac River and its connection with the Ohio River. The State of Pennsylvania also had early made surveys of possible canal routes in that state; but the time had not yet come when the hopes of Washington and the ambitions of New York, Pennsylvania, Maryland, and Virginia for connecting the “east” with the “west” could be realized.

South of New York State, the mountains made the connection of the seaboard and transmontane sections with a waterway practically impossible, but highways, that could be built to and beyond the mountains, would provide a transportation facility for such traffic as could bear the high costs of carriage in horse-

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drawn wagons. As early as 1792, improved roads began to be constructed by turnpike companies that were chartered by the states and were given authority to collect tolls of those using the roads built and maintained by the companies. The Federal Government in 1806, also took an interest in road building by beginning the construction of the "Cumberland Road," or the "National Pike," which started from Cumberland, Maryland, and ran westward through Wheeling and Columbus. Twenty-one years after construction began, it had, by successive extensions, been built as far west as Vandalia in central Illinois. It would have been carried on into Missouri had not the railroad made its appearance and given promise of providing a much less expensive and more efficient means of transportation.

When the War of 1812-1815 ended, industrial development in the seaboard states became more rapid; there was an expansion of the foreign trade; and the opening up and occupation of the rich territory in the valley of the Ohio River and its tributaries and in the section adjacent to the Great Lakes was undertaken with ever-increasing vigor. The long-felt need of better transportation connections with the Great Lakes and the Ohio River was greatly increased. It was at this time, also, that the use of anthracite coal for fuel became possible, provided the coal could be transported from the mines to the centers of population. Thus it was that from 1815 to 1835, canal construction was actively carried on in the eastern seaboard states. The railroad and the locomotive had not yet been applied to transportation; highways and horse-drawn wagons could not render the service needed; and canals were constructed for the twofold purpose of connecting the seaboard cities with the Great Lakes and the Ohio River and of providing market for anthracite coal.

New York was able to construct a waterway without great difficulty from Troy on the Hudson River to the Niagara River and Buffalo. The work was begun in 1816 and the canal was opened for navigation in 1825. This was the trunk line of New York's system of canals, which in time reached not only Lake Erie, but also Lake Ontario at Oswego, Lakes Cayuga and Seneca, and Lake Champlain.

New York's construction of the Erie Canal stirred Pennsyl-

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vania to action, and she began her system of "public works" in 1823. By means of a railroad from Philadelphia to Columbia on the Susquehanna River, a canal up the Susquehanna and Juniata Rivers to Hollidaysburg, a portage railway that transported the boats over the Allegheny Mountains to Johnstown, and by a canal from here to Pittsburgh, the State of Pennsylvania connected her main seaport with the Ohio River by a rail-and-water route that was completed in 1834.

The states of Maryland and Virginia naturally desired to have connection with the Ohio River; but the handicap involved in the canalization of the Potomac and in overcoming the mountain barrier otherwise than by the construction of a highway proved too great to be overcome. The Chesapeake and Ohio Canal Company with the financial aid of Maryland and Virginia began, in 1828, the construction of a canal from Washington up the Potomac, but the work progressed so slowly that it was not until 1851 that the waterway was opened for navigation from Cumberland, Maryland, to Georgetown and Washington. That same year the Baltimore and Ohio Railroad opened its line from Baltimore to Wheeling on the Ohio River and thus gave the cities on the Chesapeake Bay and the Potomac River transportation connection with the Ohio River Valley.

It was in 1851, also, that the Erie Railroad reached Lake Erie. The following year the Pennsylvania Railroad Company completed a rail line from Philadelphia to Pittsburgh. What the states south of New York had sought to bring about, the railroads had accomplished. The seaboard had been connected with the transmontane states. New York State had the advantage of possessing both canal and rail connections with the developing west and with the traffic of the Great Lakes. New York City thus early and rapidly forged ahead of the other North Atlantic seaboard cities as a center of the country's domestic and foreign commerce.

The canals constructed to connect the anthracite coal-fields with tide-water were corporate enterprises that were carried out or begun during the decade and a half preceding the introduction of the railroad. These canals included

those paralleling the Lehigh and Schuylkill Rivers to their mouths and the Delaware River from the mouth of the Lehigh to Bristol, Pennsyl-



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vania; the Delaware and Hudson Canal from Honesdale, Pennsylvania, to Roundout on the Hudson River; the Morris and Essex Canal from Easton on the Delaware to Jersey City; the Delaware and Raritan Canal from the Delaware River, at Bordentown, across New Jersey to New Brunswick, on the Raritan River. Baltimore was reached from the coal-fields via the canals down the Lehigh, Schuylkill, and Delaware Rivers, and the Chesapeake and Delaware Canal connecting the two bays. Baltimore also had a water route from central Pennsylvania via the Susquehanna and Tidewater Canal, which was used more for general merchandise than for coal shipments.<sup>1</sup>

Most canals other than those just listed were constructed by the states or by corporations largely aided by the states. Until checked by the financial panic of 1837 construction was actively carried on by numerous states, and less vigorously thereafter by several states, until it became manifest that the railroads were a better transportation facility than were the canals of that time with their small dimensions and their correspondingly small and slow-moving barges. The railroad could also be more easily constructed and could be of service to more places than a canal could. Thus it was that the states, while continuing their active aid to "internal improvements" up to the Civil War, gave increasing assistance to the corporations that built the railroads. The states early gave substantial aid to railroads as well as to canals. The indebtedness that had been contracted by 18 states up to 1838 included \$42,871,084 spent on railroads, \$6,618,868 on highways, and \$60,201,551 for canals.<sup>2</sup> This, however, was only the beginning of the expenditure of state funds for "internal improvements." When the immediate effects of the panic of 1837 were overcome the states went ahead, completing old projects and carrying out new ones for two more decades.

The states that engaged most extensively in canal construction were New York, Pennsylvania, Ohio, Indiana, and Illinois. Pennsylvania found her canals to be a heavy burden and sold the main ones to the Pennsylvania Railroad and the Sunbury Railroad in 1857 and 1858. The canals thus bought were not operated. The other canals have been abandoned by the state.

<sup>1</sup> *Transportation by Water*, by E. R. Johnson, G. G. Huebner, A. K. Henry, p. 535.

<sup>2</sup> E. L. Bogart, *Economic History of the United States*, p. 206.

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Ohio twice tried the plan of leasing her canals to a corporation for operation, but without satisfactory results. Most of them have gone out of existence, as have also the canals in Indiana. According to the Tenth Census, the total length of the canals that had been built in the United States up to 1880 was 4,468 miles. They had cost \$214,041,802. Of the canals that had been constructed 1,956 miles had been abandoned, leaving 2,512 miles in operation in 1880. Since then, most of the state canals have been abandoned.

The causes accounting for the fact that the states for the most part did not continue canal construction beyond the eighteenth-fifties, and that the traffic on most canals declined rapidly after a few years of operation, may be briefly cited. The state borrowed funds to construct canals and to finance other "internal improvements." They did not provide for the amortization of these debts, because they assumed that the revenues obtained from the canals, and the interest received on the funds advanced to the corporations that were aided, would carry the obligations that the states had incurred. Most of the state funds loaned to the corporations or invested in their stock were not recoverable. The states shared the fate of many private investors whose capital went to help carry new enterprises through their unprofitable early years. Moreover, the absence of a sound national monetary system made all loans and investments precarious. The states were without experience in the management of their finances, and they did what, to the surprise of all conservative-minded men, the United States Government has done during the depression years of the nineteen-thirties; they spent funds freely without providing for the revenues required to meet the obligations incurred.

That most of the state canals proved to be a burden to the treasuries of the states and not a source of income was "partly due to the fact that the canals had not always been well located." They had been "located when the industries of the states were yet young. When the states developed, the movement of freight was often not in the direction of the canals, and this left to the waterways only the comparatively unimportant local traffic. The canals, poorly located and ill adapted to perform large commer-

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cial services, were unable, in most cases, to hold their own against the railroads.”<sup>3</sup>

The two states that have maintained their interest in canal ownership and operation are New York and Illinois, which have not only retained but also enlarged and modernized a part of their old canal systems. Illinois, with the aid of the United States, has opened up what is practically a new waterway connecting Lake Michigan with the Mississippi River. New York and Illinois have modernized their waterways since 1900, when the present increased public interest in the improvement and larger use of inland waterways began to be manifest.

During the later decades of the nineteenth century most of the inland waterways of the United States, other than the Great Lakes, lost to the railroads most of their traffic; but this period of decadence was followed by the present period of renaissance of public interest, during which the amount of public funds spent upon inland waterways has rapidly increased. Whether or to what extent the rivers now being improved and the canals recently enlarged or now in process of construction will share with the railroads, pipe-lines, and highways the tonnage of future freight traffic only experience can definitely determine. Some of the factors that will probably affect the future traffic use of inland waterways will be considered later in discussing the present waterways policy of the United States.

### INLAND WATERWAYS POLICY OF THE FEDERAL GOVERNMENT

The history of the Federal Government's interest in the improvement of inland waterways begins with Jefferson's administration when his Secretary of the Treasury, Albert Gallatin, prepared a general program of highway construction and waterway developments; and, as has been stated, the building of the National Pike was begun. The construction of other roads, the improvement of river navigation, and the building of canals by the Federal Government was not promptly started, presumably

<sup>3</sup> From *Inland Waterways: Their Relation to Transportation* (1893), by E. R. Johnson, p. 33.

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for lack of funds. The War of 1812-1815 further postponed the undertaking of public works. During the decade following 1815, there was a renewed effort made, under the leadership of Henry Clay, who for a time had the support of John C. Calhoun, to get the United States to supplement the work being done by the states and the canal companies to provide the country with needed transportation facilities, and when in 1825 John Quincy Adams became President and Henry Clay Secretary of State, the activity of the Federal Government in carrying on and aiding works of "internal improvement" was resumed.

In a short time, however, there was a change in policy. The slavery question had come to be a controlling factor in American politics. The question whether the Federal Government could limit the territorial expansion of slavery was not settled by the Missouri Compromise of 1820, but was made a definite issue, an issue that baffled all efforts of settlement until it was finally brought to an end by the Civil War and the abolition of slavery. Andrew Jackson became President in 1829; he was from Tennessee; and, while he became the champion of a strong national government, he also believed in states' rights. Moreover, he was opposed to Adams and Clay, especially Clay, and all their works. Jackson supported the champions of states' rights, the "strict constructionists," who maintained that the Federal Government was without authority to construct public works within the states, but might contribute funds to the states to assist them in carrying on such works. Jackson's policy was followed by his successors; and it was not until the Civil War had broadened the interpretation of the Constitution that the Federal Government, in 1870, inaugurated the policy of aiding waterways which it has since maintained and to which it has given increasing emphasis each successive decade.

It was in 1870 that Congress began the policy it has since followed, with changes in method of procedure, of carrying on river and harbor improvements continuously, funds therefor being regularly appropriated, formerly each biennium, now usually each year. Congress directs the Corps of Engineers of the United States Army to make surveys of designated waterways. The survey of a waterway having been made, a report with recommen-

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dations for or against the improvement or construction of the waterway is made by the engineers that made the survey. This report, along with others that have been made of other waterways, is reviewed by the Board of Engineers for Rivers and Harbors, and then transmitted by the Chief of Engineers to the Secretary of War and by him to Congress. Congress decides what works shall be executed, the works thus authorized being executed by the Corps of Engineers when and as funds therefor are made available by Congressional appropriations.

Prior to 1890, Congress directed the Corps of Engineers to execute designated works and appropriations were made for individual works, the action of Congress in selecting the projects to be carried out and in deciding on the amount to be appropriated for particular works being quite certainly influenced, if not determined, by the pressure of local interests. This is equivalent to saying that improvements were decided upon and carried out not only upon their merit, but also to secure personal and party political support. It was the "pork-barrel" system of legislation and appropriations in its most glaring form. Moreover, when an improvement or a construction project was authorized, a partial appropriation therefor was made, the subsequent appropriations being made when and as Congress chose. This was appropriately named the "dribble" system of appropriations.

Some improvement in procedure was made in 1890, when Congress began placing the larger works, such as those for the improvement of the Ohio or the Mississippi River, upon a "continuing contract" basis. The Secretary of War was authorized to enter into a contract or contracts for the execution of the approved project, and by so doing to obligate the Government to make such later additional appropriations as would be needed to enable the Government to fulfil the terms of its contract obligations. The later appropriations required to carry out the contracts were a part of those included in the sundry civil act that is passed by Congress year by year.

The procedure adopted in 1890 was generally followed until 1921, when Congress enacted the Budget and Accounting Act. Such an act had been recommended as early as President Taft's administration. It provided that the President shall submit at

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the opening of Congress each year a budget itemizing the expenditures recommended for each purpose requiring government funds. Such a budget will state the amount needed and recommended for "river and harbor improvements." With this recommendation before it, the Rivers and Harbors Committee of the House of Representatives prepares a bill, upon which the House acts, listing the projects whose execution is authorized. The bill then goes to the Senate and follows the regular course of congressional legislation. To carry on the work thus authorized by the Rivers and Harbors Act an appropriation is provided for in a bill or bills originating with the House Committee on Appropriations. Congress makes a lump-sum appropriation for rivers and harbors, which sum is, by authority that has been granted by Congress, distributed among the authorized works by the Board of Engineers for Rivers and Harbors and the Chief of Engineers. The amount allocated to each work is decided by the Chief of Engineers and the Board.

There has been much said concerning the importance of having a definite plan of waterway development, a coordinated system of inland waterways, so far as that is possible and practicable, and to select works to be executed and to make appropriations therefor with a view to creating a "network of transportation" by lakes, rivers, and canals. It was this goal that Mr. Hoover had in mind; and it was when Mr. Hoover was Secretary of Commerce that Congress, in 1925, directed the Secretary of War to prepare and submit to Congress an estimate of what it would cost to survey the "navigable streams of the United States . . . with the view to the formation of general plans for the most effective improvement of such streams for the purposes of navigation and the prosecution of such improvement." In April, 1926, the report that had been requested by Congress was made, and the report listed 200 streams, the cost of surveying which was estimated to be \$7,322,400. By the Rivers and Harbors Act, January 21, 1927, Congress ordered the survey to be made. Those interested in the general development of inland waterways had long urged that such action be taken in order that the increasing expenditures upon inland waterways might be so allocated as to further the development of a national system of inland navigation.

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The movement that is still in progress and has been gaining greater headway during recent years, to bring about the general improvement of the inland waterways of the United States and their larger use, started shortly after the return of prosperity following the business depression of 1893 to 1898. The rapid expansion of production and of the traffic to which it gave rise taxed the capacity of the railroads to provide the necessary transportation. Highway improvement was still in its early stages, and the motor truck, as an important freight carrier, was still 15 or more years in the future. The rivers and canals at the beginning of the century were of little service. They had long been neglected, and had become an antiquated means of transportation, while their successful competitors, the railroads, had made steady technical progress. The traffic on the Great Lakes was large and was growing. Why should not the country's large rivers be made serviceable by means of adequate channels, and why should not the canals of New York and Illinois, and the Atlantic intracoastal canals, be enlarged and modernized? The rapid economic and industrial development of the country that was under way and would continue required additional transportation facilities. The country needed inland waterways as well as railroads. This conviction on the part of the public was one that naturally resulted from the conditions that prevailed during the first decade of the century. No one could then foresee the phenomenal technical improvements that were to be made to the locomotive and to the railroads—especially those that have been made since the World War—and much less could the amazing growth in highway transportation have been foretold. Probably no one could have thought it possible that within two or three decades, the railroad, the pipe-lines, the highways, and the waterways—not to mention the airways—would provide the country with such a surplus of facilities as to create a transportation problem almost as baffling as that resulting from inadequate facilities.

The forces that brought about waterway improvement and construction by some of the states and by the Federal Government were not only the impersonal and disinterested one just referred to; there was also the influence exerted by shippers, and industries, communities and sections of the country that expected

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to derive individual or local benefits from the free use of transportation facilities provided at public expense. The fact that the organizations representing these special interests maintained that the economic and industrial benefits resulting from the development and construction of inland waterways would be so widespread as to promote the general welfare did not purge their motives of all self-seeking purposes. As has been said elsewhere,<sup>4</sup> "This mixture of motives is unfortunately not exceptional, as the good in the promotion of public enterprises is frequently obliged to associate with what is mainly selfish."

The National Rivers and Harbors Congress during the past 30 years has held annual meetings in Washington. This country-wide organization, whose meetings are attended by delegates from many national and local organizations, has done much to crystallize public sentiment in support of a comprehensive inland waterways policy; but, while it has without doubt influenced legislation, both state and Federal governments have probably acted more in response to the pressure exerted by the numerous strong local organizations that are less concerned about general policy than about the execution of particular projects. The names of the organizations indicate the waterways and the localities in which they are interested—the Atlantic Deeper Waterways Association, the Ohio River Valley Improvement Association, the Lakes-to-the-Gulf Deep Waterways Association, the Upper Mississippi River Improvement Association, the Missouri River Improvement Association, the Western Waterways Association, the Columbia River Association, the Lake Carriers Association, and the Great Lakes Tidewater Association. As individual associations have accomplished their main purpose they have become inactive or less active; but some of those in this incomplete list of organizations are as vigorous as ever.

The individual who exerted the greatest influence in the early development of the present nation-wide interest in inland waterway improvement and construction was President Theodore Roosevelt, who, in 1907, appointed an Inland Waterways Commission "to prepare a comprehensive plan for the improvement

<sup>4</sup> *Transportation by Water*, *op. cit.*, p. 540.



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and control of the river systems of the United States." The Chairman of this commission was the able and broad-minded Chairman of the Rivers and Harbors Committee of the House of Representatives, Theodore E. Burton, who had been, and for some years thereafter was, a prominent exponent of a genuinely national policy of inland waterway improvements. The Commission made a preliminary report <sup>5</sup> the following year to President Roosevelt, who had come to think of waterways as one of several natural resources—water, forest, mineral, and land resources—that should be so conserved and utilized as to be of lasting public benefit. Putting thought into action, the President, in May, 1908, brought together in a three-days' conference at the White House the governors of the states, representatives of national organizations, and experts in the several subjects to be discussed. The Conference and the discussion that took place impressed upon the public the importance of the conservation and wise utilization of natural resources. The educational influence of the Conference was enhanced by the President's action in appointing a National Conservation Commission that made a report in 1909. Moreover, out of the White House Conference of 1908 came the organization of a national Conference of Governors whose annual meetings were for a number of years helpful in shaping the policies adopted by the states concerning many questions.

The activity of the President during 1907 and 1908 in the improvement of inland waterways may have influenced Congress to include in the Rivers and Harbors Act of March 3, 1909, a provision for a United States National Waterways Commission to be composed of members from the House of Representatives and the Senate. The committee's chairman was Theodore E. Burton who devoted much time during the ensuing three years to investigating inland waterways and to preparing reports for consideration and adoption by the Commission. After inspecting the principal waterways in Europe and noting their improvements and their traffic, and after some investigation in the United States, the Commission made a preliminary report to Congress in

<sup>5</sup> Preliminary Report of the Inland Waterways Commission, Feb. 3, 1908, Senate Document No. 325, 60th Congress, 1st Session.

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January, 1910. Its final report was submitted in 1912.<sup>6</sup> The two volumes, one the preliminary report of the Inland Waterways Commission (1908) and the other the preliminary and final report of the National Waterways Commission (1912), presented a comprehensive account of the condition and use of the inland waterways of Europe and the United States and made several recommendations as to legislation needed for the greater utilization of the inland waterway resources of the United States.

One recommendation made by the National Waterways Commission in its preliminary report of 1910 was that when a railroad company reduces freight rates temporarily to take traffic away from a carrier upon a competing waterway, or to force such competing water carrier out of business, the railroad company should not be allowed to raise the rates it has lowered "unless, after hearing by the Interstate Commerce Commission, or other competent body, it should be found that such proposed increase rests upon changed conditions other than the elimination or decrease of water competition." This recommendation met with the approval of Congress and was included in the Transportation Act of June 18, 1910 (the Mann-Elkins Act), and is now paragraph (2) of Section 4 of Part I of the Interstate Commerce Act as amended.

Another recommendation made by the National Waterways Commission both in its preliminary report of 1910 and in its final report of 1912 was that the Interstate Commerce Commission "be given power to compel physical connection between railroads and waterways whenever practicable and necessary for the formation of through routes." The National Waterways Commission realized the necessity of aiding the waterways by making possible, first of all, the convenient interchange of traffic with connecting railroads and, second, by making certain that traffic might move over a rail-and-water or water-and-rail route on a reasonable through rate; accordingly, the further recommendation was made that the Interstate Commerce Commission "have power to compel railways to charge less than the local rates to all

<sup>6</sup> *Final Report of the National Waterways Commission*, Senate Document No. 469, 62nd Congress, 2nd Session. The Commission's preliminary report of January, 1910, is made Appendix I of the final report of 1912.

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lake, river, and seaports on through traffic to be exchanged with boat lines engaged in domestic commerce." These two recommendations were embodied in Section 11 of the Panama Canal Act of August 24, 1912, and have become paragraphs (13) (a) and (b) of Section 6 of Part 1 of the present Interstate Commerce Act where the Commission is empowered to "establish through routes and maximum joint rates between and over such rail and water lines and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced." Some years before, by the Hepburn Act of 1906, the Commission had been given authority to establish through routes by rail and water lines, to fix the maximum through rates and to apportion the through rate between or among the participating rail and water carriers. This authority was expanded by the Panama Canal Act of 1912, which gave the Commission authority to require the railroads, when practicable, to make physical connections with waterways, and was further strengthened by the Transportation Act of 1920 and especially by the Denison Act of 1928. Since 1920, common carriers upon inland waterways have been able to secure the establishment of through rail-and-water and water-and-rail routes and rates, wherever such an arrangement is found by the Interstate Commerce Commission to be in the public interest.

The Government's interest in inland waterways and their use was increased by the World War. In order to add to the transportation facilities, the maximum possible use of which had been made necessary in the prosecution of the war, the Government organized barge-line services upon canals in New York State and elsewhere and established a government barge line on the Mississippi and Warrior rivers. The authority for such operation was provided by Congress in the Federal Control Act of March 21, 1918. To perform these services the Director-General of Railroads acquired existing equipment and made such additions thereto as were practicable. When the Federal operation of railroads was brought to an end by the Transportation Act of February 28, 1920, the Government did not cease its operations upon inland waterways. That Act provided that "all boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise

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waterways" should be "transferred to the Secretary of War; who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during the Federal control shall be continued." In taking over the facilities the Secretary of War was to carry out contracts and obligations made by or through the President during Federal control and funds were made available for that purpose. Expenditures made by the Secretary of War after the facilities had been thus transferred to him were to be made "out of funds now or hereafter made available for the purpose." The government operation upon canals was discontinued in a short time; but the services on the Mississippi and Warrior rivers were continued and to them have since been added the present operations of the Inland Waterways Corporation upon the Mississippi River above St. Louis, on the Lakes-to-the-Gulf waterway across Illinois, upon the Missouri River to Kansas City, and upon the Savannah River.

For four years, the government's transportation services were conducted by the Inland and Coastwise Waterways Service of the War Department; then, by Act of Congress approved June 2, 1924, the Inland Waterways Corporation was created "for the purpose," as the statute declared, "of carrying on the operations of the government-owned inland, canal and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the government." The corporation thus provided for was to be incorporated by the Secretary of War who was to "govern and direct the corporation in the exercise of the functions vested in it." The Inland Waterways Corporation, whose stock, amounting to five million dollars in 1924 and raised to fifteen million dollars in 1928, is owned by the United States Government, has been liberally supported by the Government, its total net investment in 1937 being about \$24,500,000; but the corporation has not been able to operate at a profit, its operating expenses during the 13 years 1924 to 1937 being nearly equal to its operating income, leaving but little net income such as a private corporation would need to earn to provide for taxes and interest and dividends on investment. It was manifest after a few years of activity that the Inland Waterways Cor-

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poration would not be able to sell its property and business to a private corporation, and the decision that the Government would have to make would be whether to abandon its services or to continue them indefinitely. The latter alternative was chosen, and, by the Denison Act of May 29, 1928, it was provided that the Corporation should continue its operations, should begin service upon the Mississippi River above St. Louis "as soon as there is an improved channel sufficient to permit the same," and that the Secretary of War should have surveys made by the Chief of Engineers of the Army to determine "when the improvement of any tributary or connecting waterway of the Mississippi River" other than the Ohio River, has provided "a sufficient and dependable channel for the safe operation of suitable barges and towboats thereon." The waterway improvements that have been made since 1928 have enabled the Secretary of War to inaugurate the three services above referred to, that upon the upper Mississippi River, that from St. Louis to Chicago, and the one up the Missouri River to Kansas City. While the Act of 1928 authorized the Secretary of War "to lease for operation under private management, or to sell to private persons, companies, or corporations, the transportation facilities, or any unit thereof, belonging to the Corporation," the Corporation was to continue its transportation services until the navigable channels, whose improvement has been authorized by Congress, have been made "adequate for reasonably dependable and regular transportation service thereon." Moreover, when that prerequisite has been fulfilled, the lease or sale of the Government's barge lines will be made impossible, or at least very doubtful, by the stipulations set forth in the Act of 1928, which provide that the facilities of the Inland Waterways Corporation on the Mississippi River and its tributaries shall be considered one unit, and the facilities on the Warrior River one unit. There is small prospect that regular common carrier services upon the Upper Mississippi River and upon the Missouri River can ever be profitable, and it is very doubtful whether a private corporation can be found that will be willing to lease or purchase, and to guarantee to continue in operation, the Inland Waterways Corporations facilities upon the entire Mississippi River and its tributaries (other than the Ohio River). The real purpose of the

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Act of 1928 was, manifestly, not to bring about the retirement of the Government from the business of transportation, but rather to assure the continuance and expansion of the Government's operations upon inland waterways. Additional evidence in support of this conclusion is contained in the final paragraph of the Act which directed the Secretary of War to investigate the inland water route from Boston, Massachusetts, to Beaufort, North Carolina, and to report upon "the feasibility and advisability of extending the service of the Inland Waterways Corporation to the waterways included in such route, or any section thereof." It has not yet been found advisable for the Government to operate upon this "inland water route."

The services that have been rendered and are now being performed by the Inland Waterways Corporation will be further considered in discussing recent phases of the inland waterways policy of the United States. Before referring to the more important river improvements and canal constructions carried out since 1900, it will be well to state in concise form the total amount that has been expended by the Federal Government upon waterways from the beginning of appropriations therefor up to the present. The large increase in expenditures upon waterways during the last few years is shown.

The aggregate appropriations and expenditures for river and harbor improvements including expenditures for flood control, from the beginning of such use of public funds up to the present time, and the accelerating rate of increase in the amounts expended during recent years are shown by the following tables.

COMPARISON OF TOTAL AMOUNTS APPROPRIATED BY CONGRESS  
BY SPECIFIED DATES FOR RIVERS AND HARBORS

To June 30	Aggregate Appropriations	Per cent of Total Appropriated to June 30, 1932
1882. . . . .	\$ 111,299,465	6
1906. . . . .	515,427,432	26
1910. . . . .	660,604,210	34
1915. . . . .	853,737,951	44
1920. . . . .	1,041,805,547	54
1925. . . . .	1,311,597,443	67
1932. . . . .	1,941,779,999	100

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The first table, which is taken from the 1934 Report (page 87) of the Mississippi Valley Committee of the Public Works Administration, presents the facts down to June 30, 1932.

For the three years ending with June 30, 1935, the expenditures for rivers and harbors, not including those for flood control, were as follows:

1933.....	\$ 77,974,462
1934.....	104,243,354
1935.....	162,079,277
Total.....	<u>\$344,297,093</u>

The figures for 1933 to 1935 are for expenditures made and do not state the total amounts appropriated by Congress and allotted from Federal Emergency Relief Funds. The amount of such appropriations and allotments for the year ending June 30, 1934, after deducting the \$98,528,291 for flood control, was \$200,301,607; and the corresponding amount for the following year was \$246,600,909.<sup>7</sup> The larger totals for appropriations and allotments than for expenditures is readily accounted for by the fact that a large share of the allotments was for the construction of dams and for certain other river works the completion of which requires several years, not all of the available funds being spent during the year when the allotment or appropriation was made.

The figures presented in the table taken from the Report of the Mississippi Valley Committee include expenditures for flood control. The Committee states that when the amounts not attributable directly to navigation are excluded, the total expenditures of the United States for rivers and harbors down to June 30, 1932, was \$1,534,862,753. The apparently corresponding total for the three years following was \$344,297,093, which is 22.4 per cent of the amount spent during the entire preceding period of more than 100 years. This rather startling showing as to the relation of present to past expenditures is explained by the fact that the numerous large works being constructed for making the water resources of rivers available for power and irrigation are being

<sup>7</sup> An unspecified part of this was available for use in flood control. The total expenditures for the year ending June 30, 1937, for rivers and harbors and flood control were \$233,976,284.

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carried out by funds appropriated for rivers and harbors. Our "navigable rivers" are being improved not only for navigation but also for other purposes.

The amount that had been appropriated for each of the different kinds of inland waterways, as distinct from coastwise harbors and channels, up to June 30, 1932, is stated by the Mississippi Valley Committee to have been as follows.

### FEDERAL APPROPRIATIONS FOR INLAND WATERWAY NAVIGATION TO JUNE 30, 1932

	Cost of New Work	Cost of Main- tenance
Lake harbors and channels . . . . .	\$157,190,628	\$ 41,126,585
Mississippi River system . . . . .	377,816,695	61,274,077
Intracoastal canals and other water- ways . . . . .	82,536,052	27,817,860
Operation and care of canals . . . . .		116,858,340
TOTAL . . . . .	\$617,543,375	\$247,076,862

The foregoing tabulation shows that up to the end of the fiscal year 1932, the United States had expended \$198,317,213 upon lake harbors and channels, and \$666,303,024 upon rivers and canals. The corresponding expenditures, somewhat differently tabulated, for the three following years are set forth in the following table.

### FEDERAL EXPENDITURES UPON INLAND WATERWAYS, OTHER THAN FOR FLOOD CONTROL, 1933-1935

Year	Great Lakes	Intracoastal Canals and Other Inland Waterways	Total
1933 . . . . .	\$ 6,914,174	\$ 76,800,330	\$ 83,714,504
1934 . . . . .	7,975,519	72,111,014	80,086,533
1935 . . . . .	9,389,748	136,572,137	145,961,885
TOTAL .	\$24,279,441	\$285,483,481	\$309,762,922

The figures in the foregoing tables show that the expenditures of the Federal Government up to June 30, 1935, upon lake harbors and channels had been \$222,596,654, and upon rivers and canals \$976,080,135. The expenditures upon inland waterways, other than the Great Lakes, for the three years 1933 to 1935, in-



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clusive, amounted to nearly 46.5 per cent of the total previously expended. The explanation of this sudden jump in expenditures has already been given. One large category of expenditures during 1934 and 1935 was that for the Atlantic intracoastal canal upon which \$30,869,577 was expended in the two-year period. The major cause of the large increase in the expenditures has been, as stated above, the use of funds for making available the power and other resources of "navigable waterways."

The cumulative effect of the increasing emphasis that has, for a period of 35 years, been placed upon the importance of improving inland waterways and of endeavoring to develop a national system of waterway transportation is shown by the recent large expenditures upon rivers and canals. Since 1933, the public funds devoted to canal and river works have, for two additional reasons, been much larger than they otherwise would have been. One reason has been to reduce unemployment by means of a large program of public works. Another reason, and one that will presumably become increasingly potential, is that the Federal Government has made its constitutional authority to regulate interstate commerce the basis of a program of utilization of the country's waterway resources for the accomplishment of general social betterment. The Government's authority over interstate commerce gives it the power to construct dams to improve the navigation of streams. By such dams, water power is developed that can be converted into electric power which can be distributed for sale and use in the territory near and somewhat distant from the Government's power plant, such generation, distribution, and sale of electric power having been upheld by the United States Supreme Court, February 17, 1936, in deciding that the Tennessee Valley Authority could lawfully do what had been done at and from the Wilson Dam in the Tennessee River in northern Alabama.<sup>8</sup> The full significance of this decision is yet to be determined by other decisions of the Court, but it will in any event be broad enough to enable the Federal Government to go a long way in linking up the improvement of the navigation of streams with, and in fact making such improvement the basis of, "some comprehensive program for the better utilization and control of water

<sup>8</sup> *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288-372.

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resources." We shall hear much in the future of the good results that may be accomplished in different sections of the country by the carrying out of such a program.

The number of streams in the United States that have been officially declared to be worthy of improvement seems almost incredibly large. In a preliminary report upon a comprehensive plan for the improvement and development of the rivers in the United States, that was submitted to Congress by the Secretary of War in June, 1934, the statement is made that:

As a result of the War Department's investigation now nearing completion, about 2,000 river projects have been found practicable, with an estimated aggregate cost of about \$8,000,000,000. The relation between estimated costs and estimated benefits of these projects has been determined. Obviously more projects have been investigated than could be undertaken and paid for in the measurable future, but the expenditure of \$8,000,000,000 over a 50-year period would involve an average annual outlay of but \$200,000,000.

The scope of the program suggested by the foregoing statement may possibly be accounted for in part by the fact that the report comes from the body that would have charge of the execution of the works when authorized, and that would doubtless welcome having the duties and personnel that would accompany the performance of the large task. It seems quite certain, moreover, that for some years to come there will be large expenditures made for the improvement of waterways, and the utilization of their resources. Both the executive and legislative branches of the United States Government are following the policy of devoting an increasing appropriation and allotment of public funds to waterways, and their action may be taken as a general index of public sentiment, organized and unorganized.

To the objective observer and student, however, the present and prospective inland waterways policy of the United States causes some apprehension as to its wisdom and as to the sincerity of at least some of its proponents. There is no doubt that legislation concerning inland waterways results largely from the influence exerted by the numerous organizations, above referred to, whose purpose is to secure local benefits at public expense. Such organizations derive their influence from the fact that

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each legislator is, for reasons of personal advantage, disposed to favor, and to endeavor to secure, appropriations for public works in his own district. There is also convincing evidence that the amount of government funds allotted to public works, and the selection of the projects to be executed, may be influenced by considerations of party advantage, of securing larger present and future support for the political party having control of the distribution of public funds. The foregoing statement refers to but one of numerous well-known indications of the urgent need of improving the methods by which popular and representative government functions at the present time.

### IMPORTANT RIVER AND CANAL IMPROVEMENTS SINCE 1900

A brief statement concerning the five most important waterway improvements now being made by the Federal Government will suffice to show what has been done since 1900, and is now being done, to make possible a larger transportation use of inland waterways. The total amount now being spent upon the 200 or more river and harbor projects and upon canals by the Federal Government has been stated. There is no need of giving a detailed account of the aid thus given by the Federal Government nor is it necessary to consider the improvement of the harbors and connecting channels of the Great Lakes, otherwise than to state what has been spent upon them. The Great Lakes provide the world's greatest inland waterway, and they are ideally located to be of service to the large volume of traffic that is transported upon them at an exceptionally low ton-mile cost. It would be an inexcusable mistake to fail to provide the Great Lakes with harbors and connecting channels needed for shipping employed in handling the commerce using the Lakes. The five major inland waterways, other than the Great Lakes, upon which improvements have recently been made and upon which additional betterments are now being carried out, at large expense, are the Ohio River and its tributaries, the Mississippi River and its connection with Lake Michigan, the Missouri River, the Columbia River, and the Atlantic Intracoastal Waterway. A short statement regarding each of these will be made.

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The river system that has the largest traffic of all the river systems in the United States is the Ohio; and it is its affluent, the Monongahela River, that has the greatest opportunity for being of service to traffic. The Monongahela River has been given a navigable channel, somewhat more than 100 miles in length, from its junction with the Ohio River at Pittsburgh up to the coal-fields of southwestern Pennsylvania, and 85 per cent of its large tonnage, which reached 27,412,143 tons in 1928 before it was temporarily reduced by more than 50 per cent by the business depression, consists of coal and coke, the remainder being made up of sand, gravel, metals, and ores. The other tributaries of the Ohio upon which there is a traffic of some volume are the Allegheny, Kanawha, and Tennessee rivers. The Ohio River receives a substantial tonnage from the Allegheny and Kanawha rivers, but comparatively little from the Tennessee River whose traffic of a million tons a year consists mainly of sand and gravel that is moved locally between points on the river. The Tennessee drains a section that is not, and will not become, a producer of a large tonnage of heavy freight adapted to river transportation. Moreover, the river does not flow in the direction of the major currents of traffic.

The gross tonnage moved on the Ohio River in 1930 was 22,337,000 tons, while the aggregate traffic of its tributaries amounted to 36,247,000 tons. These figures, however, which total 58,584,000 tons, include duplications, some traffic being reported for two rivers. When the traffic had been greatly reduced by the business depression, the gross tonnage of the Ohio River and its tributaries amounted, in 1933, to 36,716,888 tons and the net tonnage, with duplications eliminated, was 26,433,603, of which 16,751,034 tons was Ohio River traffic composed mainly of coal and coke (59 per cent), iron and steel products (5.7 per cent), and sand, gravel, and stone (22.5 per cent). These figures show that the traffic on the Ohio River consists mainly of the raw materials used in the heavy industries, and explain why it is, as was stated by the engineers of the army in 1927, that "over 95 per cent of the commerce on the Ohio River system is handled by private carriers and the majority of the terminals are privately owned."

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The improvement of the navigation of the Ohio River was begun in 1829 and 1830 when a corporation with state and Federal aid constructed a three-lock canal around the rapids at Louisville, Kentucky. In 1874, the United States bought this canal, and in 1880 abolished the tolls that had previously been charged for its use. This was followed by work for the general canalization of the river as a whole which was carried on with modification of plans from time to time for about 25 years, when the Government decided upon a nine-foot low-water channel. This project, which involved the construction of more than 30 dams, was completed from Pittsburgh to Cairo in 1929. Up to that date, the United States Government had spent, for new construction works, for channel maintenance, and for operation and care of locks, on the Ohio River and its several tributaries about 250 million dollars. By June 30, 1933, over 45 million dollars more had been expended. These figures do not include the special expenditures that had been made for military and other purposes at Muscle Shoals in the Tennessee River. Since June, 1933, the extensive works being carried on by the Tennessee Valley Authority have required large appropriations, while very substantial sums have also been devoted by the Government to the further improvement of the Ohio and Monongahela rivers and to the construction of dams and locks upon the Allegheny and Kanawha rivers.

The Mississippi River is the "father of waters" and its longest and largest tributary is the Missouri River, but the tonnage of traffic upon the Mississippi is somewhat less than that upon the Ohio, while the Missouri River has so many handicaps as a transportation facility that it has had comparatively little traffic. The tonnage moved on the Mississippi including duplications, was 15,750,000 tons in 1930, and about 18,500,000 tons in 1933. With duplications eliminated, the net tonnage in 1933 was 15,598,526 tons. Although the Mississippi River and its tributaries (other than the Ohio River) drain a distinctively agricultural section of the country, but little more than one-eighth of its traffic consists of agricultural and vegetable products; while about five-eighths is made up of coal and other non-metallic minerals, and about one-eighth of metal manufactures, ma-

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chinery, and vehicles, the remaining one-eighth being composed of miscellaneous commodities. The aggregate tonnage of the tributaries of the Mississippi River, other than the Ohio and Missouri rivers, is about three million tons, a surprisingly small total.

The policy that has been followed by the United States Government in improving and maintaining the navigability of the upper Mississippi River, the amount that has been and is being spent thereon above the mouth of the Ohio River, and the small traffic results past and prospective, are concisely and very definitely stated in the Report (dated October 1, 1934) of the Mississippi Valley Committee of the Public Works Administration:

In its original condition the Upper Mississippi was navigable at certain seasons throughout the entire length, and before the advent of railroads was the most economical route to the northwest. River traffic reached its peak in the decade 1850-60 when it is said 1,100 steamboats plied the upper river. From then on the river traffic was unable to meet the competition of developing railroads; in part because of inadequate depths and obstructions, but chiefly because the rivers, unlike the railroads, were at right angles to the direction of traffic. The Congress of 1878 approved a project providing for a 4½ foot channel; and in 1907 the present project, which first provided for a 6-foot channel on the main stem above St. Louis, and lesser channels on tributaries, but was modified in 1932 to provide a 9-foot channel on the main stem. The Federal expenditures on projects of the Upper Mississippi system above the mouth of the Ohio to June 1934 were: on the main stem \$104,300,000, and on tributaries and connections \$21,750,000, a total of \$126,050,000, not including \$40,000,000 for maintenance and operation. The estimated cost of completion of the present project as it now stands is: for main stem, \$91,300,000, additional expenditures on tributaries and connections being estimated as negligible. The maximum traffic since continuous records were begun on the stretch between St. Paul and the mouth of the Missouri was 4.5 million tons in 1903. The minimum was in 1916 with 500,000 tons, between which point and 1,000,000 tons it has since varied. The great decline has been the result mainly of diminishing traffic in logs and lumber.

It is not possible by any calculations of business accounting to discover an economic justification for the vast expenditures on the projected improvement of these waterways; especially from the prevailing viewpoint of self-liquidation, but also even from the viewpoint of complete coverage of costs of maintenance and operation. It is the more impossible when consideration is given to the fact that diversion of grain traffic from railroads, which is included in present calculations, is quite



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While an economic justification for it cannot be computed by any standard business accounting formula, the Committee does not recommend its discontinuance. There are two reasons for this. First, it is part of a program which already has been authorized by the Congress; second, there is a strong argument that the main stem of the great river should be made one navigation unit from its mouth to these regionally important headwater cities and natural navigation terminals; and, incidentally, that the river system should be tied into the Great Lakes system.

The tying of the Mississippi system into the Great Lakes system was accomplished in 1934 by the completion of the nine-foot waterway from Lake Michigan to the Mississippi River via a canal and the canalized Desplaines and Illinois rivers. It remains to be seen what volume of traffic will use this waterway that replaces its predecessor of lesser depth and width. The State of Illinois and the United States have spent nearly \$100,000 per mile in constructing the nine-foot waterway, 327 miles in length, from Lake Michigan to the Mississippi River. The questions that experience must answer are whether the tonnage used on the waterway will justify the expenditure that has been made for construction and that must be spent upon maintenance and operation, and whether the nature of the service rendered by the waterway and the relation of that service to the general welfare will justify the assumption by the tax-paying public of all of the expenditures for construction, operation, and maintenance of the waterway.

There had long been a persistent demand from the waterway-promoting interests of the upper Mississippi Valley section for a Lakes-to-the-Gulf Waterway. At first, a picture was drawn of vessels steaming to and fro between the ports of the Great Lakes and the Gulf of Mexico; then a 12-foot boat and barge waterway was proposed; but the support of the Army engineers for either of those proposals was not obtained. However, when the standard nine-foot channel for the Ohio and Mississippi rivers was adopted, it seemed logical to extend the river channel by a nine-foot waterway to Lake Michigan and that has been done. As to the probable commercial value of the trans-Illinois waterway the author has ventured to make the following diagnosis:



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What are the prospects as to the traffic of this waterway across Illinois? It is nearly as long as the Erie Canal, but has a depth of 9 feet while the Erie Canal and its branches are 12 feet in depth. The Erie Canal connects Lakes Erie and Ontario with the Hudson River and thus with New York, the greatest center of traffic in America. The Erie Canal is located where the largest currents of traffic flow. Yet, as has been explained, the tonnage of the Erie and associated canals has not been large and their prospects are not very bright. Such being the fact is it probable that the waterway across Illinois, the Lakes-to-the-Gulf Waterway, which does not parallel the lines of the country's major traffic movements, will have a large tonnage and be of great service in promoting economic development? Of course, prophesying is not profitable, and it may be that future transportation conditions may develop that will make the Lakes-to-the-Gulf Waterway of greater service than now seems probable to doubting Thomases.<sup>9</sup>

It is natural to include the Missouri River within a general system of inland waterways to be made navigable and helpful to the economic development of the great interior section of the United States. It is also not surprising that those living in the large territory drained by the Missouri River, and especially those in the several large cities located along the middle reaches of the river, should have used their influence in securing congressional appropriations and executive action. Moreover, there has been genuine hope on the part of many people that a large traffic would result from the effective canalization of the river. The large river enters the Mississippi only 17 miles above St. Louis; Kansas City and the other Missouri River "Crossings" are large industrial cities. Why should not this large stream, at least from Sioux City in northwestern Iowa to its mouth, be the inexpensive bearer of a large tonnage of traffic and thus the benefactor of the tributary territory and cities?

The Government has done and is doing its part to make this possible. Prior to the enactment of the Rivers and Harbors Act of 1930, about 42 million dollars had been spent upon the canalization of the Missouri, and the plans that were adopted in 1930 included works raising the total expenditures to about 60 million dollars. That, however, was not the end. What has now been authorized to be done to improve the Missouri River, for irrigation, power development, and navigation, includes, among other

<sup>9</sup> Johnson, Huebner, and Henry, *op. cit.*, pp. 556-557.

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works, a huge dam being constructed at Fort Peck in Montana to improve the navigability of the river and to render other "benefits in connection with power development and flood control." This dam will cost 86 million dollars; the channel improvements above Kansas City will require 77 million dollars, and those below that city about 80 million dollars. The Mississippi Valley Committee states that "the total construction cost for the improvements under way will not be much, if any, below \$250,000,000."

Is this large expenditure of public funds upon the Missouri River justified? Possibly it may prove to be warranted by the results as a whole; but there has been but little traffic use made of the river in the past and there is no indication that there will be much tonnage carried upon the river in the future.<sup>10</sup> The reasons that explain why the Missouri River will not become an important traffic highway were well summarized by the Mississippi Valley Committee in the report above referred to, where the statement is made that:

The main stem of the Missouri River is being improved for navigation in the face of great obstacles and at an expense which has very doubtful justification. The obstacles hindering its effective development and use as a waterway include both the nature of the river itself and the nature of the transportation needs of the basin. The rather short navigation season in the middle and upper reaches of the river, the low flow in late summer and autumn (normally peak seasons in the traffic of the basin), the shifting natural channels, the unstable bottom, from which flood waters pick up here and there huge quantities of silt that are deposited at various points farther downstream, the similarly unstable banks in most places, the almost complete lack of navigable tributaries to serve as branch lines of traffic, the general direction of flow from the vicinity of Williston, N.Dak., to Kansas City, one that is directly athwart the dominant course of traffic, and the sparse population and low population-supporting capacity of most of the country along the upper

<sup>10</sup> The following statement concerning the traffic on the Missouri River is made in a footnote on p. 173 of the Report of the Mississippi Valley Committee. "In a letter to the Secretary of War, dated September 30, 1933, the Chief of Army Engineers said: 'There is practically no commercial traffic on the Missouri River at present except that incident to sand and gravel dredging and to ferry operations. The reported commerce in 1929 between the mouth and Kansas City was 1,160,000 tons, and between Kansas City and Sioux City 209,000 tons. Of this, all but 1300 tons consisted of construction materials moved by river contractors.'"

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reaches, are factors that restrict the commercial usefulness of the river and that make for great difficulty and great expense in attempts at its improvement.

The Columbia is one of the great rivers of the United States, possessing the largest power resources of any stream in America. Its waters can also be used, when need therefor develops, to irrigate a large area. In its tidal section, the river is an important navigation facility, providing the seaway by which large ocean vessels reach the mouth of the Willamette River 100 miles inland and thus the important city of Portland, Oregon, a few miles up the Willamette. The tidal portion of the Columbia ends at the Cascades, about 140 miles from the sea, and 40 miles above the city of Vancouver, Washington, which is located on the Columbia opposite the mouth of the Willamette, while 45 miles above Bonneville, which is at the foot of the Cascades, are the Dalles. The largest tributary of the Columbia is the Snake River which crosses the southeastern part of Washington and joins the Columbia about 350 miles from the sea and a short distance north of the boundary of Washington and Oregon. The Columbia River from the Dalles to the Snake River has an "all-year navigation" channel of four and a half feet minimum depth and the Snake River, from Lewiston, Idaho, where the river enters Washington, to its junction with the Columbia River can be navigated by shallow-draft craft. The Columbia River above the mouth of the Snake River can be made available for navigation only by the construction of several dams with locks.

The Government has had two objects to accomplish in improving the navigation of the Columbia River. The first of these was that of providing and maintaining such a channel from the ocean to Portland as is required by sea-going vessels of increasing draft. This involved the construction of offshore breakwaters to narrow the channel of the stream, and thus to cause it to erode a channel across the wide bar deposited by the river between its mouth and deep water in the ocean. It also required the dredging and maintenance of an adequate channel in the Columbia and the Willamette rivers, which channel has had to be deepened from 25 feet to 35 feet (the present project) as ships have increased in size and draft. What has been done for Portland has

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been done for other river ocean ports in the United States, and is the obvious and necessary thing to be done.

The other object to be attained in improving the Columbia River for navigation was to provide a channel above the mouth of the Willamette appropriate to the needs of the river craft and the traffic that might make use of the stream. This involved two things, constructing locks and canals by which boats and barges can pass around the Cascades and the Dalles, and canalizing the Columbia River to the Snake River, and possibly providing the latter river with a navigable channel as far as Lewiston, Idaho. Locks and canals, six and seven feet in depth, were built around the Cascades and the Dalles some time ago, and, as stated above, the Columbia was given a river-boat and barge channel above the Dalles.

The Columbia River, thus improved, had the experience of other rivers paralleled by railroads, and had comparatively little traffic other than that composed of rafts by which forest products were floated down stream. This, however, did not lessen the demand of the industrial, commercial, and agricultural organizations of Oregon, Washington, and Idaho for the further improvement of the Columbia River; and the demand broadened from a program which placed chief emphasis upon navigation to one which placed power development and irrigation in the foreground and made the improvement of navigation a secondary but important benefit to be secured. In 1933, this larger program of improving the Columbia River and utilizing its natural resources was adopted and its execution begun by the Public Works Administration which was in a position, with the approval of the President, to select public works projects to be carried out and to make allotments therefor from the large fund that Congress had placed at the President's disposal.

It was decided to construct two dams, one at Bonneville to flood the Cascades and another at the Grand Coulee in the north-eastern quarter of Washington. Both of these are initially and primarily power projects, the Bonneville Dam having some present relation to navigation, the Grand Coulee Dam being intended ultimately to provide for the irrigation of a large area. The Bonneville Dam has raised the level of the water in the pool above

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the dam from 72 to 82½ feet above sea level, and the water at the Dalles about 45 miles up the stream has been raised 28 feet. In constructing the dam careful provision was made for fishways in order that the dams may not injure the important salmon-fish industry of the Columbia River. Locks provide for a normal lift of 59 feet and a maximum of 66 feet; and the locks were given a length of 500 feet and a depth over the sills of 27 feet. The estimated cost of the Bonneville Dam up to the time of its completion in 1937 or 1938 is 42 million dollars. Later addition of more power units will add to the investment, as will also such sums as may be spent upon auxiliary works.

The Grand Coulee Dam <sup>11</sup> now being constructed was made possible by an allotment of 63 million dollars in 1933 by the Public Works Administration. Additional funds have been provided by Congress as a part of the appropriations made by the Rivers and Harbors Act of 1936. The Grand Coulee Dam is being constructed in three stages. The present dam, which will presumably be completed in 1938, will be 251 feet high and will be the base upon which a higher dam will be built. When and if the second stage of the project is completed the dam will be 450 feet high, the estimated cost of this stage being 103 million dollars. Until the third stage of construction is completed the dam can be used only to develop electric power; but when the third stage of construction is finally completed and the Grand Coulee has become a great reservoir, it will be possible to carry out an extensive reclamation and irrigation project, the total estimated cost of the dam and the power and irrigation projects being about 400 million dollars.

The foregoing details regarding the Columbia River and the two dams that are being constructed are presented as an illustration of the policy that has been adopted not only for the Columbia River but also for the Tennessee River and its tributaries and for other streams, the policy of carrying out works for the general utilization of the water resources of rivers. In the case of some streams, the improvement of navigation may be the primary purpose of the Government, while for other rivers such as

<sup>11</sup> D. Stanley, "Grand Coulee," Barron's *The National Financial Weekly*, Dec. 25, 1933.

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the Columbia, the Colorado, and even the Tennessee River, the development and sale of electric power may be the chief consideration. At the Fort Peck Dam in Montana and ultimately at the Grand Coulee Dam in Washington the reclamation and irrigation of fertile lands is as definite an aim as is the development of hydro-electric power. As the only constitutional authority of the Federal Government over the streams in which these works are being executed is the power to regulate interstate commerce, these dams are, nominally, constructed to regulate the flow of the streams and to improve their navigability. The United States Supreme Court has held that the water-power developed by the Government in the construction of dams in navigable streams may be converted into electric power, which may be distributed and sold.<sup>12</sup> Whether the water impounded by the construction of the dams can be distributed and sold for irrigation purposes may also become a question requiring judicial determination. To the layman, it would seem that if electric power can be distributed and sold, impounded water can also be.

What has thus far been done in correlating the improvement of the inland waterways for purposes of navigation with the execution of works for the utilization of all the several natural resources of the waterways has already given a new setting to the Government's inland waterways policy. The expenditure of large sums merely for improvements to navigation may not be justifiable in the case of many streams or portions of streams whose natural resources as a whole may wisely be utilized; and, when the works are carried out for the general utilization of a river's natural resources, the improvement of navigation will in many cases be made a part of the project as a whole, even though expenditures solely for the purpose of making the stream of service to navigation would not be justified.

Nature having provided bays, sounds, and river channels that furnish several protected waterways along and near the Atlantic and Gulf seaboard of the United States, there has been much sentiment in favor of connecting the several protected coastal and intracoastal waterways into a continuous intracoastal waterway along the Atlantic from Massachusetts to Florida and from

<sup>12</sup> *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288-372.

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Florida to Texas along the Gulf coast, the two waterways being joined by a canal across the northern part of Florida. A canal across a narrow isthmus connects Cape Cod Bay with Buzzard's Bay from which Long Island Sound is reached by a short stretch of open ocean. The Cape Cod Canal which had a depth of 20 feet is now being deepened to 27 feet. The old-type, shallow-depth Delaware and Raritan Canal across New Jersey has become of no commercial value, and it would need to be replaced by a canal at least 25 feet in depth, the estimated cost of which would be 210 million dollars. The Chesapeake and Delaware Canal has been given a depth of 12 feet and is being further deepened and enlarged. If there were a 25-foot canal across New Jersey from the Raritan River to the Delaware River, the majority of the vessels engaged in the coastwise trade and the smaller types of war-ships would have a protected, and for the most part an intracoastal, waterway from Boston to Norfolk. To what extent vessels would navigate such a waterway instead of the open ocean, it would not be easy to predict.

Southward from Norfolk, the Government has created a waterway to Beaufort Inlet, a distance of 198 miles. This is a 12-foot waterway made by constructing canals that connect rivers, creeks, sounds, and bays that have been canalized so far as necessary. From Beaufort Inlet south the waterway extends by canal and natural water courses to Florida. Possibly an ocean-ship canal will be constructed across Florida from Palatka on the St. John's River to the Gulf coast, work on this canal having been started in 1935 when the President made an allotment of five million dollars from the relief funds to start the project. Construction has, however, been suspended, Congress having thus far made no appropriation therefor. From the Gulf terminus of this Canal, if and when constructed, there is a long stretch of coast to the north and west which can be provided with an intracoastal waterway only by means of a continuous canal. The traffic demand for such a canal east of Apalachicola or Pensacola, or even Mobile Bay, is not evident. Traffic would doubtless be carried by the shorter and better route afforded by the Gulf. There is now a barge waterway from New Orleans via Lake Pontchartrain and Mobile Bay to Mobile and thence up the Tombigbee and Warrior rivers to Birming-

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port, Alabama. A canal from the Mississippi River above New Orleans to the Gulf Coast and thence to the major Texas ports would seem to have some traffic possibilities, and it is a logical part of an Atlantic-Gulf intracoastal waterway.

The long intracoastal waterway, consisting in considerable part of canals constructed by the Government, and those that are now in operation in New York State and in Illinois, will afford a means of determining the extent to which such waterways will be used in the future. The alternative transportation facilities will be those provided by the railroads, by the improved highways, by pipe-lines, and, in the case of the intracoastal waterway, by the ocean carriers. Inland waterways have their place in a national transportation system. Only experience can definitely determine the rôle that will be played by each of the several agencies composing a fully developed and coördinated transportation system. Moreover, when such a transportation system has once been developed, it will not remain static or unchanged. Technical improvements in one of the several agencies may give it a more prominent rôle to play. The far-reaching and phenomenal changes in transportation that have taken place in the United States during the past two decades, as a result of highway construction, the development of the motor-truck and bus, and the very recent rapid technical advances made by the railroads, could not have been foreseen. What the future has in store is likewise uncertain; but, if one were to venture a prophecy in regard to waterways, it would seem safe to say that a transportation facility such as a canal or a river channel of like dimensions imposes definite physical limitations that will prevent technical improvements and consequent economies in transportation as great as will be possible in the case of railroads, highways, and ocean carriers. If this should prove to be a valid generalization, the canal and the other inland waterways of like capacity will have increasing difficulty in meeting the competition of other transportation facilities and agencies.

### INLAND WATERWAYS POLICY: GENERAL CONCLUSIONS

The government's policy of performing barge-line transportation services upon the Mississippi and Warrior rivers, upon the



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Missouri River, and upon the waterway connecting the Mississippi with Lake Michigan has been stated in the foregoing account of the inland waterways policy of the Federal Government. The Inland Waterways Corporation has had 13 years of experience since its incorporation in 1924. It has had the consistent and liberal support of the Government, and by the Denison Act of May 29, 1928, and previous legislation the Corporation has been able to tie up its services with those of the railroads by means of through rail-and-water routes and favorable rates by such through routes. The Interstate Commerce Commission has pursued a liberal policy towards the Corporation, not only in establishing through routes and fixing lower rates by rail-and-water than by all-rail services, but also by requiring rail carriers to exchange traffic freely with connecting waterways. Furthermore, the stipulations as to the lease or sale of the facilities of the Corporation, that Congress placed in the Act of 1928, will indefinitely prevent the Secretary of War from bringing about the withdrawal of the Government from its present transportation services, until Congress amends the present law. The prospect is that those interested in the improvements to navigation now being made in the Mississippi and Missouri rivers will insist that the Government shall not only continue, but shall extend the scope of, the services of the Inland Waterways Corporation.

The traffic results achieved by the Inland Waterways Corporation have not been large, nor have they been very encouraging. During the five years ending with 1929, the tonnage of traffic averaged a little less than a million and half tons annually, while for the quinquennium ending with 1934, the yearly average was somewhat more, the annual average for the 10 years being 1,522,829 tons. For the years 1935, 1936 and 1937, the average was somewhat better—2,023,320 tons. The freight revenues received by the Corporation have covered operation expenses and provided for depreciation; but the Government has received no interest or financial return upon its investments, and the Corporation is exempt from the Federal taxes that are levied upon the business of other corporations engaged in river or rail transportation. Why the activities of the Inland Waterways Corporation should be further continued is not manifest, but if the Govern-

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ment does remain in the transportation business, should not its corporation compete with rival corporations under like terms as regards the payment of a fair return upon invested capital and as regards tax levies? Does the Inland Waterways Corporation, as now conducted, encourage private enterprise to engage in common carrier services on inland waterways, or does it tend to keep private corporations from undertaking such services?

The foregoing discussion of government aid to inland waterways has emphasized the recent enlargement of the Government's program of waterway improvements. In the case of the Tennessee, Mississippi, Missouri, and Columbia rivers and some other lesser streams, navigation improvement has been made a part of the larger purpose of utilizing the power and other natural resources of the streams. Indeed, large expenditures are being made upon several rivers and sections of rivers upon which funds could not justifiably be expended solely for making them navigable. There are manifest reasons accounting for the present large expenditures and for their recent rapid increase. One reason is that it seems wise to utilize the natural resources of the inland waterways and to make navigation improvements, when practicable, a part of such utilization. Another explanation for the very large expenditures that were made in 1933 and that have since been greatly augmented is that these expenditures have been made as a part of a large program of public works that would directly and indirectly provide employment for many men who would otherwise be unemployed. While the individual works undertaken have presumably been authorized after consideration has been given to their intrinsic merits, it would seem to an impartial observer that some large projects have been adopted that are of doubtful necessity or benefit, and that some works that may ultimately be needed are not needed at the present time. To what extent potent political pressure or the effort to secure political support may have influenced the selection of projects, it would be difficult to determine definitely; but that such pressure and such motives have been a factor affecting decisions as to the localities in which public works shall be carried out and as to the amount that shall be spent upon the

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authorized works is made highly probably by circumstantial evidence.

The decision as to what river and harbor improvements shall be made and the appropriation of funds to be used by the Corps of Engineers of the United States Army in carrying out the projects authorized have until quite recently been by act of Congress. The same has been true of other public works; but to meet an emergency Congress in 1933 placed a very large fund at the disposal of the President, this relief fund to be used to construct such public works as the President might authorize and also to be used to provide employment and relief both directly through Federal agencies and indirectly through state agencies. Presumably this policy of giving the President discretion in the selection of public works to be executed was a temporary one that will not be continued by further lump-sum emergency appropriations concerning the expenditure of which the executive branch of the Government shall have unlimited discretion. The effect of the emergency policy adopted in 1933 has been to cause a number of large waterway improvements to be started whose completion will require future appropriations by Congress. Thus Congress has allowed the Government to be committed to important public works that have been selected and begun by executive action. Whether or not the selection made may meet with the approval of the present or a future Congress, it becomes practically necessary for Congress to provide for the completion of many of the works that have been undertaken. The policy of giving the executive branch of the Government discretion in the selection of public works and in adopting projects to be carried out over a period of years involves the further possibility that the executive in deciding what shall be done may select works for the purpose of aiding in furthering the realization of such social ideals and of such changes in the social order as may appeal most strongly to the executive making the decisions. We have in the past made changes in the social order not by uncontrolled executive action but by legislation enacted by the states and the Federal Government. Will it not be wise to adhere to that policy?

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For 50 years there have been no charges made by the states or by the United States for the use of waterways that have been improved or constructed at public expense. Canals are toll-free and so are the locks, channels, and other facilities of the canalized rivers. For the first 60 years of canal construction and operation tolls were charged for the use of such waterways. Some of the canals were corporate enterprises, others were owned and managed by the states. Some of the canals antedated railroad construction, and all of the canals were brought into existence to meet a real or supposed need for new or additional transportation facilities. As the mileage of railroads increased and as the railroads developed in technical efficiency, most of the canals ceased to be a transportation necessity and practically all of them were unable to compete successfully with the railroads. The corporately-owned canals went out of service, and in course of time most of the state-owned canals were abandoned. To enable the canals to be of service and to aid them in competing with the railroads, the states abolished canal tolls; but this in most cases only postponed for a time the date of abandonment. Illinois, situated between Lake Michigan and the Mississippi River, and New York State, lying between the Great Lakes and the Hudson River and tidewater, kept their canals in operation, New York abolishing tolls upon her canals in 1882. Since 1903 New York has spent a large sum in enlarging her major canals and in modernizing their facilities. Illinois, as has been stated in this chapter has, with the aid of the United States, created a nine-foot waterway from Lake Michigan to the Mississippi at the mouth of the Illinois River. There is no charge made for the use of these canals, nor for the use of the canals included in the intracoastal waterway that has been enlarged and extended by the Federal Government.

The policy that has been and is being followed by the Federal Government in establishing and maintaining navigable channels in the rivers of the United States has been discussed in this chapter. When the Government, a few years after the close of the Civil War, adopted the policy of making regular appropriations for river and harbor improvements, there was a manifest need for increasing the country's transportation facilities. Dur-

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ing several decades following the Civil War, the mineral, forest, and agricultural resources of the country were being drawn upon and rapidly developed. The public lands of the West were fast being occupied. The latter half of the nineteenth century in the United States was a period of economic pioneering and there was special need for transportation facilities. The navigation of the rivers was improved to help meet this need, and the government funds spent in making the improvement were a contribution made by the public to promote the general economic development of the country. While transportation facilities as a whole were inadequate, the expenditure of public funds upon natural waterways to be used free of charges, and thus to be of maximum service in furthering economic development and social welfare, had a logical basis that such expenditure does not now have when the railroads, highways, pipe-lines, airways, and the waterways have provided the country with a large surplus of transportation facilities.

The more important rivers within the United States should be provided with the channels, locks, and other facilities required to make them navigable and should be made an integral part of the country's general transportation system. Moreover, when important inland natural waterways, bays, lakes, and rivers, can be connected by means of canals that can be constructed at a cost that that is not out of proportion to the commercial results obtainable, such artificial waterways should be created. Such an individual waterway project should be carried out only when there is a manifest need for the proposed waterway. There already is a surplus of transportation facilities; and the construction of an additional waterway, like the construction of a new railroad, should be required to meet the test of "public convenience and necessity."

Another sound general principle is that those who make industrial or commercial use of transportation facilities provided at the expense of the general public should make a reasonable payment for the use of the facilities. When the people of the State of New York incur a debt of 150 million dollars for canal construction and thus must carry an interest burden of six million dollars per annum, and when they have to expend four million dollars ad-

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ditional yearly in operating and maintenance expenses, it can only be equitable to require the limited number of shippers, producers, and carriers who transport their goods on the canals to pay a reasonable sum for the use of the facilities by which their transportation costs have been reduced. If no charge is made for the use of the canals, the public is paying a part of user's transportation costs. Likewise, if the United States expends 300 million dollars in constructing and operating a large number of dams and locks in the Ohio River and in providing and maintaining a nine-foot low-water channel in the river, and makes no charge for the use of the facilities thus provided, maintained and operated, those who ship or transport their goods via the river, instead of via the highways or the railroads, secure transportation services the costs of which are borne in large part by the taxpaying people of the United States as a whole. The situation as regards the Ohio River is especially significant, because not more than 5 per cent of the traffic of the river is that of common carriers, while fully 95 per cent of the tonnage is composed of the traffic of the large coal, oil, iron and steel, and other companies that use their own boat and barge equipment in transporting their products to market and in obtaining the materials and supplies used in their private enterprises. Why should the people of the United States as a whole pay a very considerable share of the cost of transporting goods upon the Ohio River, or upon other rivers?

The Mississippi Valley Committee of the Public Works Administration, whose report, made in 1934, has been referred to several times in the preceding pages, stated in discussing the Ohio River that the traffic of the Ohio was greater than that of the Mississippi and that, "Practically all this traffic is handled by private carriers who pay no tolls. In other words, under present policy, the construction costs and the operating and maintenance costs of navigation projects are at Federal expense and no part of either of these costs is directly returned to the Government. The Committee believes that this policy should be modified." The conservative opinion of this Committee, which was in favor of the larger development and utilization of the natural resources of the inland waterways of the United States, concerning the general pol-

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icy of charging for the use of inland waterways that have been improved at public expense was expressed as follows:

Transportation subsidies in the past—in theory at least—have been considered warranted only where there has been an urgent need for the expansion of transportation facilities not readily procurable through private initiative. Certainly the warrant for transportation subsidies in a period of vast and rapid expansion is much more apparent than at present when we are having difficulty in holding and consolidating our economic position.

This general conclusion of the Mississippi Valley Committee is a sound one, and one that should have greater influence than it now has in shaping public policy towards waterways and other transportation facilities provided at public expense. The point of view expressed in this chapter and the conclusion to which the foregoing discussion leads may best be summarized by another quotation from the report of the Committee:

We need new estimating, accounting and cost-finding technique not only to weigh the advantages and disadvantages of river transportation, but to determine the proper place of inland waterways in a coördinated national transportation system. It may be desirable to introduce a new element by imposing charges where they are justified by special services and special facilities and where the traffic can bear them.

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## CHAPTER XIX

### GOVERNMENT REGULATION OF CARRIERS BY WATER

THE three preceding chapters have discussed Federal, state, and municipal aid to navigation, the assistance that the United States Government has given, is now giving, and may wisely give to American shipping and shipbuilding, and the policy that the Federal Government is now pursuing in improving and extending inland waterways and in furthering their commercial use. It remains to consider what the policy of the Government has been, now is, and ought to be as regards the regulation of carriers by water.

The subject is of present and growing importance. Interstate commerce by water, coastwise, intercoastal, and on the Great Lakes, is large in volume, and the carriers engaged therein perform services of great value to the public. Moreover, the special emphasis now being placed upon the development of inland waterways—river canalization and canal construction—and the efforts being made by the Government to bring about their larger use give added significance to the question of applying to carriers by water engaged in the domestic commerce of the country government regulation similar in principle and scope to the regulation that has been adopted for carriers by rail and road. Waterways are a part, and an integral part, of the country's general transportation system. They have not only a competitive but a complementary relationship to the other facilities and agencies which together form the transportation system as a whole, the waterways, railroads, pipe-lines, highways, and airways. It is important that the complementary relationship of the several agencies should be strengthened and that there should be such coördination of agencies and facilities as will result in a transportation system that is a fact as well as an ideal. To bring this about is the task, and should be made the opportunity, of government regulation; and this is one reason why the kind of

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regulation now applied to other carriers should be applied to carriers by water.

Another reason is that the practices that have made desirable and necessary the regulation of railroad and highway carriers are prevalent among carriers by water and are producing the deleterious results from which both the public and carriers themselves suffered when the railroad and highway carriers were inadequately regulated. Competition among rival carriers by water as well as among railroads or motor carriers, may, when the carriers are not regulated, lead to ruinous warfare, to rates that are so low as to prevent the carriers from paying reasonable wages to their employees, from obtaining a fair return upon invested capital, and from maintaining and developing an efficient and dependable service. Unregulated competition among carriers by water, as in the case of other carriers, results in secret and discriminatory rates harmful to the public. Carriers by water need to be regulated by the Government for the correction of these practices and for the establishment and maintenance of such relations of the carriers by water with each other, with other carriers, and with the public they serve as will place the business of transportation by water on a stable basis, enable it to develop and to perform the services it can render most economically and efficiently.

For a long time the people of the United States adhered to the doctrine that unrestricted competition of the railroads with each other would be the public's best protection against unjust charges and practices, and until a later date the same theory was held as to the relation of motor carriers with each other and the public; but, as railway abuses developed, they were eliminated, one after another, by government regulation; and finally, in 1935 the Federal Government adopted legislation for the regulation of interstate motor carriers. As will be pointed out in what follows, Congress, beginning in 1887, has by a series of legislative enactments provided for the partial regulation of carriers by water; and legislation is now pending which, if enacted, will apply to such carriers such government regulation as will be like in scope and principles to the regulation that has been adopted for railroad and highway carriers, and that will be administered by the Inter-

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state Commerce Commission. The administration of the more comprehensive regulation will thus be vested in one body, instead of being divided between two government authorities as is the administration of the present partial and inadequate regulation of carriers by water.

### PAST AND PRESENT REGULATION OF CARRIERS BY WATER IN THE UNITED STATES

The Interstate Commerce Act, adopted in 1887, applied to "common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment," and to several other kinds of carriers and facilities with which we are not here concerned. The Interstate Commerce Commission had the same regulatory powers as to interstate traffic moved by a rail-and-water route, when the connecting carriers had a common "arrangement for a continuous carriage or shipment," as the Commission had concerning traffic moved by all-rail. However, the Commission had no jurisdiction over port-to-port traffic, and its authority over carriers by water was limited to such traffic of those carriers as was carried by them under joint arrangement with a connecting railroad.

It was not until the enactment of the Hepburn Act in 1906 that the Commission was able to exercise much authority over carriers by water. That act gave the Commission power to establish through routes and rates not only over two or more railroads but also when one of the connecting carriers was a water line. It thus became possible for the Commission to establish a "common arrangement" for through shipments by rail and water; and, as the Act gave the Commission power to pass upon the reasonableness of the rates of carriers subject to its jurisdiction, it could establish the maximum joint rates by a through rail-and-water route and apportion the through rates between or among the participating carriers.

The effective authority of the Commission over carriers by water, as well as over railroads, was increased by the Mann-

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Elkins Act of 1910, which gave the Commission power to fix maximum rates, not only upon complaint of interested parties, but also after investigations and hearings initiated by the Commission upon its own motion. By the Act of 1910, the Commission could also suspend proposed rates pending the determination of their reasonableness. The authority of the Commission to establish through rail-and-water routes and rates was, however, somewhat limited for a time by the provision in the statute that "the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad." The effect of this limitation was largely if not fully removed by the additional power over through rail-and-water routes and rates that was given the Commission by the Panama Canal Act of 1912.

One other change in the Interstate Commerce Act that was made by the Mann-Elkins Act of 1910 had an important effect upon carriers by water. This was the change that put "teeth" into the long-and-short-haul provision (Section 4) of the Act of 1887, first, by prohibiting carriers from charging less for the longer than for the shorter intermediate haul unless permission were first obtained from the Commission, and second, by eliminating from the section the phrase "under substantially similar circumstances and conditions." While that phrase was in the law, the railroad could claim the right to make a higher rate on traffic to an intermediate point than to a more distant destination, because the absence of competition at the intermediate point and the presence of controlling inter-railway, or railway and waterway, competition at the more distant point created dissimilar circumstances and conditions as regards traffic and rates. The Interstate Commerce Commission, early in its activity, had ruled that the competition of railways, subject to government regulation, with carriers by water, not subject to such regulation, at one point, and the absence of such competition at another point, might create such dissimilar circumstances and conditions as to warrant non-observance of the requirements of the long-and-short-haul section of the Interstate Commerce Act. Thus, until the fourth section of the Act of 1887 was amended and strengthened by the Act of 1910, the railroads could charge especially low

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rates to and from points where they competed with carriers by water; whereas, after 1910, the rail rates at such points could not be lower than the rates at intermediate points where there was no competition of rail and water lines, unless the Commission relieved the rail carriers from the requirements of the long-and-short-haul clause; and the Commission, in order to safeguard the short-haul points against unfair discrimination, pursued a policy of enforcing the fourth section rather rigidly.

This stabilization of railroad rates, by government regulation, at ports where the water carriers competed with the railroads, enabled the water lines to make their unregulated rates just enough lower than the railroad charges to draw off from the railroads such volume of traffic as the water carriers might wish to secure. This was to the distinct advantage of the coastwise and particularly to the intercoastal water lines, which, however, have not been prosperous. There has, ever since the World War, been a surplus of shipping in the coastwise and especially the intercoastal trade; the competition of the lines with each other has been very keen and has been very partially limited by their "conference" agreements. Had carriers desiring to establish a coastwise or intercoastal service been required, during the past 25 years, to obtain from a public authority, preferably the Interstate Commerce Commission, a certificate of public convenience and necessity, and had the rates charged by the carriers admitted to the service been regulated by the same governmental body, the carriers would have been more prosperous, the public would have avoided the economic consequences of secret and discriminating transportation charges, and the railroads would not have been subjected to the destructive warfare of unregulated rivals. The facts presented in this chapter give validity to this conclusion.

Several provisions of the Panama Canal Act of August 24, 1912, were intended to safeguard and further the interests of waterways and carriers by water, and the measure of government regulation of such carriers was somewhat increased. That act gave the Interstate Commerce Commission jurisdiction over common carriers transporting property over interstate routes by rail and water "in the following particulars, in addition to the jurisdic-

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tion given by the Act to regulate commerce, as amended June 18, 1910”:

1. To require a rail carrier to make physical connection with the dock of a carrier by water, or to require the rail and water carriers jointly to make such connection, when such connection, and the consequent provision for the interchange of traffic by the rail and water carriers, is found to be of “public convenience and necessity.”

2. “To establish (for interstate traffic) through routes and maximum joint rates between and over . . . rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.” This enables the Commission to exercise authority not only over the traffic and rates of such through routes by rail and water as may be established by voluntary action of the carriers concerned, but also over the traffic and rates of such interstate through or joint rail-and-water routes as the Commission may require the carriers to provide. This has enabled the Commission to exercise jurisdiction over more of the traffic and rates of carriers by water than would otherwise have been possible.

3. To require the railroads to establish proportional rates by rail, different from the rates on corresponding local traffic, “to and from the ports to which the traffic is brought, or from which it is taken, by water carriers,” and the Commission may “determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply.”

4. To require a railroad that enters into through traffic arrangements with a “water carrier operating from a port in the United States to a foreign country . . . to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.”

A most drastic provision of the Panama Canal Act, and one intended to be especially influential in furthering the development of transportation by water was the one prohibiting a railroad company, or other carrier subject to the Act to Regulate Commerce, from and after July 1, 1914, “to own, lease, operate, control, or have any interest whatsoever . . . in any common carrier by water operated through the Panama Canal or elsewhere with

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which such railroad or other carrier aforesaid does or may compete for traffic." The Commission was given authority to decide whether there was actual or potential competition between a railroad and a vessel or line of vessels that it controlled. The Commission was, however, given the power to permit the continuance of the operation of vessels by a controlling or owning railroad, if the Commission finds that the continued operation will be "in the interest of the public and is of advantage to the convenience and commerce of the people . . . and will neither exclude, prevent, nor reduce competition on the route by water under consideration." The Commission ruled that the trunk-line railroads could not lawfully continue to own or operate their coastwise steamship lines and their lines on the Great Lakes; but the Commission decided that the New York, New Haven and Hartford Railroad Company might continue its ownership of the New England Steamship Company operating a line of vessels from New York to points in New England, and that the Southern Pacific Company might continue to own the Morgan Line of steamers connecting Galveston and New Orleans with New York City.

Four years after the adoption of the Panama Canal Act, Congress began, in a tentative manner, the direct and separate regulation of carriers by water by "An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water in the foreign and interstate commerce of the United States; and for other purposes," approved September 7, 1916. The Act applied to common carriers by water operating upon regular routes in foreign commerce or in interstate commerce coastwise and upon the Great Lakes. The law did not apply to vessels in the chartered or tramp services, nor to carriers upon inland waterways other than the Great Lakes.

Enacted at a time when the early participation of the United States in the World War seemed probable, the Shipping Act gave the Shipping Board, with the approval of the President, the power to construct, lease, or purchase vessels for use in the marine

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trade of the United States or as naval auxiliaries or army transports. The President might also take possession of vessels for naval or military purposes, the fair price thereof to be determined by appraisers. The Shipping Board was authorized to form one or more corporations "for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States," and in accordance with this authorization the Emergency Fleet Corporation was established. The Shipping Board had been in existence only a few months when the United States entered the World War and in consequence the activities of the Board for several years were almost entirely taken up with the heavy task first of hurriedly constructing a huge tonnage of shipping, then, of operating, through the Emergency Fleet Corporation, a large wartime fleet and a great many post-war vessel lines in the commerce of the United States with different part of the world, and, third, of getting the United States out of the ocean transportation business by disposing of government-owned shipping, so far as possible, to such American companies as could be found for the purchase of vessels and steamship lines

The present discussion is concerned not with the wartime shipping policy and experience of the Government but with the peacetime regulation of shipping and with the regulatory provisions of the Shipping Act of 1916 and of the merchant marine laws that have subsequently been enacted. The Government advanced but a short distance toward the goal of effective regulation of carriers by water by enacting the Shipping Act of 1916. The general purpose of the law as stated in its preamble, quoted above, was defeated by the inadequacy of the provisions of the statute. The primary aim of the regulatory requirements of the Act was to prohibit and prevent unfair, monopolistic, and discriminatory practices of carriers subject to the law, while the secondary object was the regulation of rates. American steamship companies were permitted to become members of the conferences of ocean lines; upon the condition that the agreement which a carrier made with other carriers when becoming a member of a conference should first be submitted to, and be approved by, the Shipping Board. Carriers subject to the Act were, however, pro-



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hibited from entering into "any combination, agreement, or understanding" with other carriers that involved the payment of deferred rebates to shippers, or involved the exclusion from the combination or agreement "a common carrier by water which is a citizen of the United States" that may apply for admission thereto.

The unfair monopolistic practices specifically prohibited by the Act of 1916 were that no common carrier subject to the Act should:

1. Pay a deferred rebate to a shipper for not giving any of his shipments to a competing carrier.

2. "Use a fighting ship either separately or in conjunction with any other carrier." The Act defined a fighting ship to be "a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade."

3. "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations, when such are available, or resort to other discriminatory or other unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

4. Make a contract with one shipper that unfairly discriminates against any other shipper as regards cargo space accommodations, the loading and landing of freight, or the adjustment and settlement of claims.

The Act of 1916 sought to prevent unfair discrimination in the rates and services of carriers subject to the Act by making it unlawful for them:

1. To grant any unreasonable preference or advantage to any particular person, locality or description of traffic.

2. "To allow any person to obtain transportation for property at less than the regular rates . . . by means of false billing, false classification, false weighing or false report of weight or by any other unjust or unfair device."

3. To influence any marine insurance company or its agents not to give a competing carrier by water as favorable a rate on vessel or cargo "as is granted to the carrier or other person subject to this Act."

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The provisions of the Act of 1916 as regards the regulation of rates and fares were that every common carrier subject to the Act should (1) "establish, observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs," (2) file with the Shipping Board and keep open to public inspection its maximum rates, fares, and charges, and (3) give the public and the Board 10 days' notice of a proposed increase in its rates, fares, and charges. The rates, fares, and charges thus filed by the carriers could not be suspended by the Board; but, when the Board found that the rates, fares, and charges being exacted by the carriers subject to the Act were unjust or unreasonable, the Board might determine and prescribe reasonable maximum charges.

For several reasons, the Shipping Board exercised but slight regulatory control over the charges of carriers subject to its jurisdiction. One reason was that the law required the carriers to publish maximum rates, fares, and other charges instead of those actually to be levied; and the result was that the carriers filed schedules of maximum charges which were well above those that they actually made for their services in the conduct of their highly competitive business. Another explanation of the Shipping Board's slight regulation of rates was that for several years the Board had to devote its activities to the difficult task of wartime construction and post-war operation and sale of vessels. Regulation gave way to construction and operation of ships, and to efforts to build up an American merchant marine by translating government ownership and operation into private enterprise. Furthermore, the Act of 1916 did not give the Shipping Board sufficient power to enable it to regulate effectively the rates of interstate carriers by water. The Board could not suspend proposed rates pending the determination of their reasonableness, it could not prescribe minimum or actual rates, and it was powerless to limit the operation of the competitive forces that really determined the charges of the coastwise and intercoastal carriers. Had the Shipping Board been more zealous in its efforts to regulate the charges of the carriers subject to its jurisdiction, it could hardly have been more than partially successful. The prohibitions in the Act of 1916, and in the succeeding Act of 1920,

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against unfair monopolistic and discriminatory practices on the part of carriers have apparently been effective. If this were otherwise more complaints would have been brought to the Shipping Board and its successor, the Shipping Board Bureau of the Department of Commerce.

The second general regulatory law applying to carriers by water was the Merchant Marine Act of June 5, 1920, that was adopted by Congress for the purpose, as stated in the title of the Act, "To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and to provide for the disposition, regulation and use of property acquired thereunder and for other purposes." Section One of the Act contains the ambitious and hopeful declaration that it is "the policy of the United States to do whatever may be necessary to develop and encourage the maintenance," under the American flag, of "a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and to serve as a naval or military auxiliary in time of war." This declaration, from which the phrases here quoted are taken, has seemed so satisfactory to the framers of subsequent legislation that, as has been noted, it was reaffirmed in Section One of the Merchant Marine Act, May 22, 1928, as the primary purpose of that law, and was embodied with certain changes in the Merchant Marine Act approved June 29, 1936.

The Act of 1920 provided, first of all, for the repeal of the acts of emergency shipping legislation that had been enacted as war-time measures. Then follow the provisions of the act to be carried out by the Shipping Board in disposing of the Government's large fleet, and in establishing and putting into operation such steamship lines as it finds to be "desirable for the promotion, development, expansion and maintenance of the foreign and coastwise trade of the United States." The Board was to sell such lines to responsible American buyers if they could be found, but if no citizen could "be secured to supply such service" the Board was to operate the vessels upon such lines until the business of the lines was so developed that the vessels might be sold on satisfactory terms, or until it was evident to the Board that the lines could not be made self-sustaining. In carrying out this

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mandate of Congress the Shipping Board, as has been stated, established a large number of government steamship lines to foreign countries. The lines were operated by the Merchant [formerly Emergency] Fleet Corporation or by companies with which the Fleet Corporation made operating agreements.

The Shipping Board was zealous in its efforts to sell its ships and vessel lines to private buyers; and, by charging very low prices for the vessels, the Board was able during the decade following the close of the World War, to dispose of most of its vessel lines and of a part of the large number of ships that the Government had constructed to meet conditions created by the participation of the United States in the World War. For a large share of the huge fleet of merchant vessels thus constructed there was no commercial need, and the only thing to do with the surplus tonnage was ultimately to sell many vessels for scrap. The success of the Shipping Board in getting the Government out of a large part of the ship-operating business was such as to cause those ports and shippers that directly benefited from the services rendered by the Government to try to put brakes upon the Shipping Board by including in the Merchant Marine Act of 1928 the stipulation that the Board should not sell any line of vessels unless "in its judgment the building up and maintenance of an adequate merchant marine can be best served thereby, and then only upon the affirmative vote of five [of the seven] members of the Board duly recorded." Fortunately, this restriction upon the Shipping Board did not have much practical effect.

One important part of the Merchant Marine Act of 1920, as amended by acts passed in 1924 and 1927, provided for government aid for shipping, rather than its regulation, by authorizing the Board to build up from its receipts a construction loan fund of 125 million dollars from which it might make loans "to aid persons citizens of the United States in the construction in private shipyards or navy yards in the United States of vessels of the best and most efficient type for . . . service on lines deemed desirable or necessary by the Board." An account of this loan fund and of the larger one authorized by the Act of 1928 has been given in discussing government aid to the merchant marine.

Two other provisions of the Act of 1920 that were intended to

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be helpful to the American marine in the foreign trade have been considered in the chapter upon government aid. One of these was the ineffective and misdirected requirement limiting special export and import railroad rates to and from ports of the United States to traffic carried at sea in American ships; and the other was the mandate directing the President to notify foreign governments of the termination, at the end of a 90-day period, of all provisions in treaties to which the United States was a party, which restrict the right of the United States to impose discriminating duties on imports brought in foreign ships or which limit the right of the United States to impose discriminating tonnage duties on foreign vessels. Had the Shipping Board, which had discretionary authority, enforced the first of these two mistaken requirements, the foreign trade of the United States would have suffered. Had the mandate imposed upon the President not been found invalid by the Supreme Court, and had the President carried out the mandate, the retaliatory measures adopted by foreign governments would have seriously burdened both the foreign commerce of the United States and the American merchant marine.

The main provisions of the Merchant Marine Act of May 22, 1928, have been referred to in this and the preceding chapter. It was enacted, as its title states, "To further develop an American merchant marine, to assure its permanence in the transportation of the foreign trade of the United States, and for other purposes." The first provision of the Act was the one, which has been referred to, that sought to prolong the period of the Government's operation of ocean steamship lines by requiring affirmative action by five of the seven members of the Shipping Board to effectuate the sale of a government-owned line of vessels. Soon after the Act of 1928 was passed, the general sentiment of the country definitely favored the withdrawal of the Government from the business of owning and operating merchant shipping, and the policy of the Shipping Board during the five years that intervened between the passage of the Act of 1928 and the abolition of the Board in 1933 was in harmony with public sentiment.

The second major feature of the Merchant Marine Act of 1928 was the provision authorizing the construction loan fund to be

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increased to 250 million dollars. The large extent to which loans have been made from the fund has been discussed in a previous chapter. It was the provisions concerning payments for the carriage of ocean mails that constituted the main feature of the Act of 1928. It was an act to subsidize American ships by awarding very liberal contracts for carrying ocean mail to foreign countries. The amount of the subsidy that has been granted by the Government, the sums received by American steamship lines, and the results that were jointly produced by the construction loan fund and by the mail subsidies have been set forth in the discussion of government aid to the merchant marine; the conclusion to which that discussion led was that mail subsidies, while expensive, were not the most effective and businesslike means of aiding the American merchant marine as a whole.

The Intercoastal Shipping Act, approved March 3, 1933, unlike the Act of 1928, was definitely regulatory in purpose, and by it Congress made a step, though a short one, toward the ultimate goal of the actual and adequate regulation of carriers by water. The Copeland Act of 1933, this name being derived from that of the Chairman of the Senate Committee on Interstate Commerce, amends the Shipping Act of 1916, as amended by legislation prior to 1933, "for the purpose of further regulating common carriers by water in interstate commerce of the United States engaged in transportation by way of the Panama Canal." The Act applies to common and contract carriers engaged in intercoastal transportation via the Panama Canal, and required each carrier to file with the Shipping Board and keep open to public inspection all of its rates, fares, and charges. These were the actual rates, fares, and charges that the carrier must make and collect for services rendered. No change might be made in such rates, fares, and charges, except upon 30 days' notice, unless the Board allowed a change to be made in a shorter period of time. The Board had authority to prescribe the form in which the carrier's schedule of charges shall be published and filed, and "whenever there shall be filed with the Board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification . . . regulation or practice . . . the Board shall have . . . authority, either upon complaint

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or upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation or practice. . . . Pending such hearing and decision thereon," the Board may suspend the proposed schedules, but not for more than four months beyond the time it would have gone into effect. If the Board found that the proposed schedule was unlawful it did not go into effect; but the Act states (and this made the law a weak one) that, "Nothing contained herein shall be construed to empower the Board affirmatively to fix specific rates."

By the Merchant Marine Act of 1936, the powers that had been vested in the Shipping Board, and that were, in 1933, transferred to the Shipping Board Bureau of the Department of Commerce, were given to the United States Maritime Commission. The provisions of the Act of 1936 and the duties of the Maritime Commission have been discussed in Chapter XVII.

The Copeland Act has done something, but not much, to stabilize the rates and interrelations of the intercoastal carriers. There continues to be a surplus of agencies and of shipping; the competition of the carriers with each other is acute; and the conferences that have been organized by the carriers have been only partially effective. The relation of the intercoastal carriers and the transcontinental railroads is one of warfare. Antagonism and rivalry largely displace efforts to develop coördinated and complementary services by water and rail. The past experience and the present situation of the intercoastal carriers, and the same is true of the coastwise carriers, make manifest the need, in the interest of the carriers themselves as well as the public, of at least two measures of government regulation—one requiring a company proposing to enter the coastwise or intercoastal service as a common carrier to obtain from an appropriate public authority (preferably the Interstate Commerce Commission) a certificate of public convenience and necessity, the other essential measure of regulation being the vesting in the same regulatory body, the power over the rates of the common carriers by water that is now exercised over the charges of the railroads.

It is especially important that the several agencies that regulate

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the carriers by water, rail, road, and air should not only be coördinated, but that they should be unified. Regulation by several separate authorities, as at present, is bound to result in duplication of effort and in working at cross purposes. This means greater expense and less efficiency. The former Coördinator of Transportation, Mr. Joseph B. Eastman, whose long and exceptional experience in dealing with the problems of government regulation give special weight to his opinion, has on numerous occasions emphasized the importance of unifying the agencies of transportation regulation. He has made the following concise and convincing statement:

The Federal Government now exercises some control over such transportation [carriers by water], but the authority is divided between the Interstate Commerce Commission and the Shipping Board Bureau, and is inadequate and incomplete in important respects. The same body which regulates railroads and motor carriers ought, in my judgment, to regulate water carriers as well. The thing to be regulated is transportation, and not some particular part of it. The various forms of transportation are interlocked and interrelated in many ways, and if we are to deal fairly and impartially and consistently with them all, the way to do it is plainly to concentrate responsibility in a single body which will play no favorites.<sup>1</sup>

As is indicated by the facts set forth in the chapters of this volume that discuss the state and Federal agencies that aid in the development of waterways, highways, and airways, and that have administrative authority over the facilities used by water, railroad, highway, and air carriers, there are two general phases of transportation regulation, one primarily administrative in character, such as that exercised by the Department of Commerce regarding shipping and aëronautics, and another phase that is semilegislative and semijudicial in nature such as that which has long been exercised by the Interstate Commerce Commission over railroads and which is in the process of being applied to interstate motor carriers on the highways.

In working out the unification of the agencies that regulate transportation, and in giving the Interstate Commerce Commission jurisdiction over carriers by water, it may be practicable

<sup>1</sup> From an address made at a Transportation Conference held in Detroit, Michigan, March 19, 1936.



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and advisable to leave with the Department of Commerce, the Treasury Department, and with the Secretary of War and the Corps of Engineers of the United States Army, most of the administrative and other functions they now have regarding ships and waterways. The regulation of carriers by water—as regards the issuance of certificates of convenience and necessity, corporate financing, intercorporate relations, the service rendered, the regulation of rates, fares, and charges, through routes and joint rates by water-and-rail and by water-and-highway carriers, the consolidation of carriers by water with each other or with other carriers—should be vested in the Interstate Commerce Commission which would presumably exercise its functions through a special water-carrier bureau corresponding to the bureau of motor carriers that has been established by the Commission for the Administration of the Motor Carrier Act of 1935.

### PROPOSED LEGISLATION FOR THE REGULATION OF CARRIERS BY WATER

Early in 1935, during the first session of the 74th Congress, a bill that had been drafted by the Coördinator of Transportation and his staff providing for the regulation of carriers by water, was introduced into the Senate and referred to the Committee on Interstate Commerce and was presented to the House of Representatives and referred first to its Committee on Interstate and Foreign Commerce and soon thereafter to the Committee on Merchant Marine, Radio, and Fisheries. Hearings were held by each Committee. The Senate Committee completed its hearings, and after amending the bill in several particulars, as the result of the hearings, the Committee reported the bill favorably to the Senate, June 21, 1935. However, the bill was not acted upon by Congress, either in 1935 or in 1936. In January, 1937, the bill was introduced in the House of Representatives, and hearings thereon were held by the Committee on Merchant Marine, Radio, and Fisheries. After those hearings the bill with some changes was reintroduced in the House as H.R. 5719. The bill takes the form of an amendment to the Interstate Commerce Act and if adopted would become Part III of that Act—Part I being the Act of

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1887 as it had been amended prior to 1935, while Part II is the Motor Carrier Act of 1935. The proposed Water Carrier Act states that:

It is hereby declared to be the policy of Congress to regulate transportation by water carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient services by water carriers and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relation between, and coördinate transportation by and regulation of, water carriers and other carriers; and develop and preserve a system of transportation by water properly adapted to the needs of the commerce of the United States and of the national defense.

When and if this laudable purpose is accomplished, the ideal that should be the aim will have been attained! Success will require time and experience; but, if the bill becomes a law, a good start will have been made. The bill provides for the detailed regulation of common carriers by water in interstate commerce, and for a narrower scope of regulation of interstate contract carriers. The bill does not provide for the regulation of private carriers, that is, "those who carry solely their own property or the property of those by whom they are controlled or with whom they are affiliated." Mr. Eastman stated that such carriers were eliminated from the original bill upon the theory that should the Commission, after experience, find that their regulation was needed in the public interest it could bring the matter to the attention of Congress.<sup>2</sup>

The present regulation of common carriers by water in foreign commerce is to be continued and the regulatory powers now exercised by the United States Maritime Commission over carriers by water in both interstate and foreign commerce are to be transferred to the Interstate Commerce Commission which would thus have authority over carriers by water similar to that over rail, pipe-line, and highway carriers. The intercoastal Shipping Act of 1933 is repealed, along with the sections of other shipping acts conflicting with the provisions of the proposed law.

<sup>2</sup> Fourth Report of Federal Coördinator of Transportation on Transportation Legislation, January, 1936, p. 11.

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The proposed legislation limits the regulation of contract carriers by water by excluding from the provisions of the law "transportation by interstate contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by interstate common carriers by water in the same trade or route." The Interstate Commerce Commission is to determine what transportation may thus be exempted from regulation. Not an easy task! The provisions of the proposed law are not to be applied to transportation "within the limits of a single harbor or between places in contiguous harbors."

The proposed legislation would, in general, apply to common carriers by water the Federal regulation to which railroads and motor carriers are now subject. The law, if enacted, would require *common carriers* by water to provide safe and adequate services, to establish and observe reasonable rates, fares, charges, and classifications, and to publish and file the same with the Commission, to charge only the rates, fares, and charges thus filed, and to give 30 days' notice of changes in any and all charges. *Contract carriers* are to publish and file with the Commission schedules of minimum rates or charges or, if the Commission so requires, copies of contracts or agreements as to charges.

The Commission acting upon a complaint or upon its own initiative, may, after hearing, decide whether rates of common carriers are unjust or unreasonable, and if rates are found to be unlawful the Commission may fix and prescribe the lawful rates to be charged thereafter. In fixing rates the Commission is to be guided by the same rule of rate-making as has been established for the making of railroad rates. The Commission may suspend proposed rates for a period of seven months pending the determination of their reasonableness. As regards the rates of contract carriers, the Commission may prescribe the minimum rate or charge, and such rates or charges shall "give no advantage or preference to any such contract carrier in competition with any interstate common carrier."

Pooling and other operating agreements among common carriers by water are made lawful unless disapproved by the Com-

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mission. Common carriers by water, like railroad and motor carriers, will be required, if the proposed legislation is enacted, to obtain from the Commission a certificate of public convenience and necessity before engaging in business, while contract carriers will have to secure permits. Two or more common carriers by water may consolidate or merge, or a person not a common carrier may acquire control of two or more common carriers by water, if the Commission finds such action "will be consistent with the public interest," but when such control is obtained by a person not a common carrier such person becomes subject to the Commission's regulation as regards accounts, records, and reports. The Commission would be given authority to regulate the issue of securities (when the issue exceeds \$500,000) of common carriers by water and of corporations authorized to acquire control of such common carriers. The Commission would be given power "to require annual, periodical, or special reports from water carriers engaged in interstate transportation."

As has been stated, the proposed legislation would transfer from the Maritime Commission to the Interstate Commerce Commission the administration and enforcement of the pertinent provisions of the Shipping Act of 1916, the Merchant Marine Act of 1920, and the Intercoastal Shipping Act of 1933. Such provisions of those acts as are inconsistent with the proposed legislation would be repealed, care being taken to provide that "nothing shall be construed to alter or diminish other powers now vested in the Department of Commerce," that are not specifically transferred to the Interstate Commerce Commission.

### NEED FOR GOVERNMENT REGULATION OF CARRIERS BY WATER: PRINCIPLES THAT SHOULD BE CONTROLLING

The need for such government regulation of carriers by water as would be provided by the proposed legislation is definite and convincing, despite the fact that there are those who are opposed to its enactment. Some of the opposition results from the fact that the regulation of water carriers would be helpful to the rail carriers whose motives are thought to be the promotion of their interests at the expense of the carriers by water and of the gen-

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eral public. It would unquestionably be to the advantage of carriers by rail, if the services, rates, and fares of the carriers by water were regulated, and if the competitive relations of the rail and water carriers were stabilized by public authority, but regulation would also be of advantage to the carriers by water, especially common carriers whose present competitive struggles with each other and with other agencies of transportation make their business unprofitable and their future status uncertain. The Coördinator of Transportation is correct when he states, as he does in his Fourth Report, above quoted, that:

Need for adequate regulation of water lines exists wholly apart from their relations with the rail lines. Internal conditions in the water carrier industry, in and of themselves, require such regulation. . . . Many of them [the water carriers] have recognized and publicly avowed the need for comprehensive regulation, and among the common carriers there seems to be little if any dissent on this point."

It is not surprising that some contract and private carriers by water that serve large shippers should object to the Government's interfering with them, but it is the unregulated activities of such carriers that in part account for the difficulty encountered by common carriers in building up and developing their services. It is the common carrier by water that suffers most from the present demoralizing and unprofitable situation that results from unregulated competitive warfare; while it is the common carrier, who is under obligation to serve alike all who desire service, that the public as a whole is most dependent upon for transportation by water. Government regulation of both contract and common carriers by water is essential to the successful development of such transportation by water as will adequately meet the needs of the public.

Much has been said as to the desirability and importance of developing a coördinated and well-balanced national transportation system including the facilities and agencies of transportation by rail, pipe-line, water, highway, and air, each performing that part of the total service that it can most economically and efficiently render. If this is the goal that we have set ourselves to attain, then we must bring about the full coördination of the several agencies and facilities of transportation; and this will

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be impossible so long as we fail to regulate some of the agencies as regards their services and rates, their relations with each other, and their relations with other agencies. The application of like principles of government regulation to all carriers concerned is an essential prerequisite to the real coördination of the services and facilities of the carriers. If a coördinated and well-balanced national transportation system is to be developed, carriers by water, as well as other carriers, must be regulated by the Government.

The principles that should be adhered to in the government regulation of all agencies of transportation were stated and briefly discussed in Chapter IV of this volume. Those principles should be controlling in legislating for the further regulation of carriers by water :

1. Regulation should be constructive in purpose and not merely corrective and punitive. The correction and elimination of abuses is essential but that is only the first and preliminary step to be taken.

2. Government regulation of the several agencies of transportation should be impartial, each agency being treated with equal justice. To favor, by subsidies or otherwise, one agency of transportation to the detriment of another agency may so handicap the agency that has been discriminated against as to limit its development of facilities and its increase in efficiency of service. Impartial government regulation of the several agencies of transportation requires (*a*) that all agencies should be regulated, and that the regulation of all should be of like scope and in accordance with like principles; and (*b*) that the user of each agency or facility of transportation should bear the cost of the service received. It is illogical that the public should bear a part of the cost of the service obtained by some shippers while other shippers bear all the cost of service they receive. The difficulty of applying this principle in connection with highways and waterways is realized; but the principle is a valid one, and should be adhered to as far as it is practicable so to do. Unless this is done, the development of a well-balanced and coördinated general system of transportation will not result from government regulation.

3. It is a well-established principle of public regulation of

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transportation that legislation should designate the carriers to be regulated, define the general scope of regulation, state the specific matters to be regulated, and establish a commission to interpret, apply, and enforce the provisions of the law. Legislation should not fix rates nor should it make specific requirements as to particular services to be performed or as to equipment to be employed in rendering the services. It is essential to wise and efficient transportation regulation that the commission should have a large measure of discretion in interpreting and applying the requirements of legislation. This principle has been carried out, with but slight deviation therefrom, in congressional legislation for the Federal regulation of carriers. The states in the past have in numerous instances sought to fix by legislation requirements as to service, equipment, rates, fares, charges, and other matters that should be determined by administrative action. Recent legislation by the states is less subject to this criticism. As regards the regulation of carriers by water the legislative policy followed by the states is unimportant, because such carriers are for the most part engaged in interstate commerce. It may be assumed that the Federal Government in the further regulation of transportation by water will adhere to the principles it has thus far followed in the regulation of interstate carriers.

4. All government regulation of carriers—whether they be carriers on the land or on the water—should not discourage, but should stimulate private initiative and enterprise. It would seem to be manifest that private initiative and enterprise, and the investment of private capital in such enterprise, in the case of a particular transportation agency, will not be stimulated by a government policy that either frees a competing agency or kind of transportation from government regulation or that transfers to the general public a part of the expense incurred by such competing agency or kind of transportation in performing the service it renders. It would also seem equally evident that private initiative and incentive in the development of transportation by water, or otherwise, will not be stimulated by the Government's engaging in transportation in competition with private carriers. If government operation and private operation competed under like terms and conditions, the result would probably not be

beneficial, because the Government by taking over a part of the traffic would limit the development that would otherwise be possible for private enterprise; but, as is well known, the Government does not, or seldom does, compete on like terms and conditions. For the capital employed in the conduct of its operations, the Inland Waterways Corporation, for example, does not pay interest to the investor, nor does the property of the corporation pay taxes to its owner, the Government, that is, the people of the United States. The private carrier by water, competing with the government carrier, has to remunerate the owners of the capital employed and has to pay taxes on its property; and it may be added that the private carrier by rail that competes with the government carrier by water has, in addition to such capital costs and taxes as are borne by the private carrier by water, the burden of providing, maintaining, and paying taxes upon the property in its road-bed and also in terminal facilities that are more extensive and expensive than those that carriers by water usually provide. Indeed, waterway terminals are often provided by states and municipalities at public expense.

5. The government regulation of carriers by water, and the same is true of carriers by rail, cannot be successfully or satisfactorily accomplished by the partial nationalization of the services of transportation. Several countries experimented with the partial nationalization of their railroads, but the experiment was not long continued. Complete government ownership followed. Canada has been forced by her unfortunate pre-war, wartime, and post-war policy to take over and operate the railroads composing the Canadian National System; but it is evident that Canada must eventually either withdraw from railroad ownership and management, or go the whole distance of nationalizing all the railroads in the Dominion. The United States, through the Inland Waterways Corporation, is engaged in transportation upon the Mississippi River and some of its tributaries, the purpose being to encourage private enterprise to engage in common carrier services upon inland waterways other than the Great Lakes; but the result has been rather the opposite of what was hoped for. As long as the United States continues its river and canal transportation operations, it will impose a handicap upon the



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activities of corporations that undertake the performance of like services. The larger use of inland waterways by common carriers must come about, by such government regulation as will, first of all, protect such carriers from destructive competition with each other, with contract and private carriers on the waterways, and with railroad and motor carriers; and will, in the second place, further the full coördination of the facilities and services of carriage by waterways, railroads and highways. When these and other transportation facilities and services, and when the several kinds of carriers, are so regulated as to bring about the development of a definitely and fully coördinated general system of transportation, then will the inland waterways be used to perform the services they can render most efficiently and economically.

### PROBLEMS AND CONTROVERSIAL QUESTIONS OF WATERWAYS POLICY AND THE GOVERNMENT REGULATION OF CARRIERS BY WATER

Railroads have been regulated by the Federal Government for half a century; and, by the Motor Carrier Act of 1935, provision has been made for the regulation of interstate, common, and to some extent, contract carriers upon the highways. Will the public favor and require like congressional legislation regarding interstate carriers by water? It is manifest that public sentiment is not unanimous and does not strongly support such legislation. There will be obstacles to be overcome and controversial questions to be settled in bringing about the adequate and effective regulation of carriers by water; and, while there will be objection to the exercise of additional public control over coastwise and intercoastal carriers, the opposition will be strongest to applying to transportation and carriers upon inland waterways the principles and provisions of government regulation that have been applied to railroad and highway carriers.

It is not surprising that the public should have a more friendly feeling—perhaps one might call it a sentimental feeling—for waterways than it has for railroads and highways. The rivers, lakes, and ocean ways are nature's ways, that all may use; they

preceded the railroads, and improved highways; they were long regarded by the public as its safeguard against the exaction of unfair rates by the railroads; the railroad ownership, control, or operation of vessels or vessel lines with which the railroad does or might compete is prohibited; and transportation by water, even on rivers and canals, is thought to be less expensive than by any other means of carriage. Legislation for the regulation of waterways, even the inland waterways that have been provided by nature or constructed at public expense, is advocated by the railroads; therefore, must not such legislation be intended to help the railroads to the detriment of the public? Moreover, why should the public regulate transportation and carriers upon public ways? Such ways should be for the free and unhampered use of the public.

If this diagnosis of general public sentiment and feeling is correct, it explains why the public has difficulty in thinking of legislation for the regulation of carriers by water, and particularly of carriers upon inland waterways, as being necessary, or sound in principle or constructive in purpose or aim. There is evidence, however, that the general public, in contradistinction from those parts of the public that have a special interest in the improvement of particular waterways, is beginning to ask whether the use, present and prospective, of waterways warrants the large expenditures that have recently been made, and are now being made, for river canalization and canal construction. The general public seems also to be asking with increasing frequency at least two questions—whether and to what extent the waterways improved, constructed, and maintained at public expense are being used by common carriers that serve the general public, and whether it is fair to the taxpaying public that the facilities of inland waterway transportation, to provide which the public has made large outlays, should be used free of charge, not only by common carriers that serve the public, but also by contract carriers who make use of the waterways for private gain, and by private industries in transporting to market the products of their mines and mills. The fact that the traffic of private carriers constitutes an increasing percentage of the total tonnage of the New York State Barge Canals, and that nearly all

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of the tonnage on the two most-used rivers, the Monongahela and the Ohio, consists of the traffic of private carriers, and the further fact that very large sums are being currently spent upon the improvement of some rivers and the construction of some canals that will probably have but little traffic, other than that of a local character, will presumably in due time cause the public to question the wisdom of at least some phases of its present waterways policy.

To change the present policy of very partial regulation of carriers by water, and of the free use, by all classes of carriers, of water transportation facilities provided at the expense of the general public, especially the free use of river and canal transportation facilities, will give rise to at least one perplexing question. The Government has spent and is spending large sums upon the construction and maintenance of dams and locks in some canalized rivers, and upon the construction and operation of some canals, that are being, and will be, used by a relatively small tonnage of vessels and traffic. To charge tolls or lockage for the use of these transportation facilities would reduce the traffic of the waterways to yet smaller proportions. The alternative facilities of transportation by railroads and highways would be used for a part of the shipments that would be made upon toll-free and lockage-free waterways. Such a consequence of charging for the use of the facilities of inland waterways will meet with disapproval as long as public policy and legislation are concerned primarily with the fostering of particular agencies of transportation instead of with the development and most economical use of a general transportation system that coordinates all facilities and agencies.

As regards the principle involved in charging for the use of the waterway facilities that have been provided at public expense and as regards the practicable policy that the Government may well adopt, the views of the Mississippi Valley Committee of the Public Work Administration merit special consideration. In the Committee's Report, that was made in October, 1934, and from which several quotations have already been made in the foregoing discussion of inland waterways policy, the following statements are made :

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Generally speaking, reasonable charges should be levied on new projects. This should not be so interpreted as to preclude promotional rates during the development period.

Where making such charges would bring about the disuse of facilities already in existence, and especially where the government is under no material expense for maintenance and operation, it would be unwise to levy charges on such existing projects. The policy should be generally to charge something where special services or special facilities are provided.

A change in the Government's policy towards waterways and the adoption of legislation applying to carriers by water such regulation as is being applied to railroad and highway carriers is quite certain to encounter the opposition of political forces. The members of Congress are prone to regard themselves quite as much as representatives of the districts and states from which they are chosen as statesmen concerned with the welfare of the entire nation. Each Congressman is under the pressure of political self-interest to secure appropriations for public works for his district or state, in order that he may thereby have a stronger claim upon the support of the electorate. Some representatives and senators are statesmen with a genuinely national interest and concern; but many follow a course determined by apparent political expediency, and it is this fact that gives such potency to the organized pressure of local or particular interests. To say this is to state nothing new or startling but merely to call attention to a well-recognized weakness inherent in representative government. Apparently that weakness can be overcome or offset only by the creation of a public sentiment that will approve and enforce higher standards upon the part of legislators and other officials of the Government.

### SUMMARY AND CONCLUSIONS

The general conclusions to which the foregoing discussion leads have already been indicated. They may be briefly summarized:

Carriers by water, coastwise, intercoastal, and those on the Great Lakes, rivers, and canals, should be regulated by the Government. The bill, whose provisions have been summarized in this

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chapter, would, if enacted into law, provide for regulation of desirable scope and character.

The regulation of transportation and carriers by water, as is also true of the regulation of highway transportation and carriers, involves some problems that do not arise in the regulation of railroads, because of the presence and prominence of contract and private carriers. The general aim of the regulation of carriers by water should be to assure to each class of carriers, common, contract, and private, a definite field within which it may function and develop its services.

The legislation that is enacted for the regulation of carriers by water should be based upon and be in harmony with the general principles that should be controlling in the regulation of all agencies of transportation, and that have been generally adhered to by the United States Government in its long experience with the legislative and administrative regulation of railroad transportation and carriers. Such regulation, while necessarily corrective of abuses, should be constructive in aim. It should give private enterprise the opportunity and incentive to develop and improve each agency of transportation as a definite part of a well-coördinated whole, a general transportation system.

The regulation of all transportation agencies, facilities, and services, those by rail, pipe-line, road, water, and air, will make possible their coördination into a general system, and such coördination will be of benefit, not only to the public that is served, but also to each of the several classes of carriers. The ill effects of unrestricted competitive warfare within each class of carriers and between or among different classes of carriers can be kept within desirable limits, financial difficulties and uncertainties can be lessened, and more rapid progress can be made in the technical improvement of facilities and in the development of economy and efficiency of service. What is true of carriers by land and by air is true of carriers by water; their regulation will be both beneficial to the public and helpful to the carriers.

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PART V

GOVERNMENT AID AND REGULATION  
OF HIGHWAY TRANSPORTATION  
AND CARRIERS





## CHAPTER XX

### GOVERNMENT AID AND TAXATION OF HIGHWAY TRANSPORTATION AND CARRIERS

THE automobiles, buses, and trucks have given the highway a new and greatly enlarged place as a transportation facility. The rapid development of the railroads had restricted the use of the highways to local transportation; but the application of mechanical power to the propulsion of road vehicles and the phenomenally rapid improvement in the gasoline engine have caused the roads to be increasingly used, first for intercommunity, and later for long-distance, travel, and for passenger and freight transportation. The practicability and the desirability of using the roads for intercity and long-distance travel and traffic have brought about the construction and maintenance by the states of extensive state systems of high-grade, hard-surfaced roads, and these systems, by coöperative action of the states and through the influence exerted by the Federal Government, have been so coördinated as to create for the United States as a whole a national highway system. For the use of this highway system and the local roads in the United States there are about 22,600,000 private automobiles, 3,700,000 trucks, and 120,000 in-city and intercity buses. Highway policy and highway transportation have become subjects of great importance.

The discussion in this chapter will be limited to a survey of local, state, and Federal aid to highway construction and to an account of the taxation of highway transportation and carriers; the regulation of intrastate and interstate motor transportation and carriers will be considered in the two following chapters. The word survey is used advisedly, and must be applied to the discussion of government regulation as well as to that of public aid, if this treatise is to be kept within desirable limits. Highway transportation and the relations of the state and Federal Governments to the development and maintenance of roads and

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to their use by the different classes of carriers is a complicated subject upon which much has been, and is being, written. The present survey is concerned with the legislative and administrative policies and practices of the states and the United States concerning the development and use of highways, with what the policies have been, now are, and may well be.

The primary purpose is to discuss government regulation, but, as aid and regulation are closely integrated parts of the highway policy of the state and Federal governments, the discussion calls for at least a summary account of the policy followed by the states and the Federal Government in the construction, improvement, and development of highways. The kind and scope of the regulation that may be and should be placed upon the use of the highways by different kinds of users is determined, in part, by the fact that the highways are public ways that the public has provided for use under such terms and conditions as the appropriate government authority may deem to be in the public interest. The terms and conditions that may rightly be fixed for the use of the highways will depend upon the means by which the highways that are being regulated have been created and are being maintained and developed.

### LOCAL, STATE, AND FEDERAL AID TO HIGHWAY TRANSPORTATION

Before railroads were constructed, the only means of travel and transportation were the natural and artificial waterways and the highways, both of which inadequately served the needs of the public. The first step taken by the states to provide highways for other than local use was to charter corporations with authority to construct roads and charge tolls for their use. At the places where the tolls were collected, a gate consisting of a pole armed with pikes and so hung as to turn upon a post was swung across the road, and this caused the road to be called a "turnpike," and its builder a "turnpike company." Following 1790, many toll roads were constructed by the so-called turnpike companies, the number of such roads being especially large in the New England and Middle Atlantic states. "The greatest mileage was built

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in Pennsylvania, and what was done in that state is typical of what occurred in many other parts of the country. In 1790, a company was chartered to build a turnpike from Philadelphia to Lancaster, and this road, begun in 1792, was completed in 1794. Later this road became a part of a continuous line of turnpikes extending from Trenton to Steubenville on the Ohio River, a distance of 343 miles. Before the construction of railroads began in this country, 102 Pennsylvania companies had built 2,380 miles of roads in that state at a cost of nearly \$8,500,000."<sup>1</sup> Toll roads were not always profitable to their owners, and the use of the toll roads for long hauls decreased as railroads were built. In course of time the turnpike companies turned their roads over to the public authorities of the towns and townships through which the roads ran, but some turnpikes were being operated as toll roads as late as the early years of the present century.

For a time the Federal Government seemed to be about to engage extensively in constructing trunk-line highways. When Jefferson's Secretary of the Treasury, Albert Gallatin, drew up his plan for a national system of internal improvements to be carried out by the Federal Government, consisting of canalized rivers and of canals and roads, he included a number of highways of major importance. Congress provided for the construction of one, but only one, of the trunk-line highways included in Gallatin's plan, the Cumberland Road, or the National Pike, which was begun in 1806. Starting from Cumberland, Maryland, it was built westward by stages through Wheeling, Ohio, to Columbus in the same state, and finally, 21 years after construction began, it reached Vandalia in central Illinois. The further extension of this interstate highway for horse-drawn vehicles was made inadvisable by the advent of the railroad and its apparent superiority as a facility for long-distance traffic.

A number of the states engaged in highway construction or aided the turnpike companies in building roads. The spread of settlement westward and the economic activity that followed the War of 1812 to 1815 caused the states to interest themselves in providing additional transportation facilities, at first, by promoting

<sup>1</sup> E. R. Johnson, *American Railway Transportation* (1903), p. 14.

or engaging in canal and highway construction and later in aiding corporations in building railroads. During the decade before and after the advent of the railroads, the states actively promoted canal and highway construction; but as the mileage of railroads increased, and as the investments that the states had made in canals, and in highway and railroad enterprises, in most instances, resulted in the loss of both interest and principal and a corresponding increase in public debts, the states necessarily restricted their program of "internal improvements," so far as possible.

As has been stated in Chapter XVIII, the states abandoned some canals, sold some others, and maintained the remainder usually on a toll-free basis. New York State's canals, because of the traffic on the Erie Canal, were used more largely than those in other states and tolls were maintained until 1882, when the increasing railroad competition brought about the abolition of tolls on the canals. As the impaired credit of the states and the burden of their debts compelled them to limit their expenditures for "internal improvements," the construction and maintenance of all highways again became the task of the local governments, the towns and townships in the northern states. In the southern states, the counties and the district subdivisions of the counties sometimes had charge of road construction and maintenance. From the middle until the latter part of the nineteenth century, the states did not concern themselves with highway construction or with the development of state roads. With the exception of such toll roads as the decreasing number of turnpike companies maintained, highways were local and were for the most part earthen roads sometimes with, but more largely without, a hard surface of gravel or crushed rock.

State aid to highways and the development of the present state highway systems began in 1891 when New Jersey adopted a State Aid Act providing for the construction of roads by counties with state assistance and in accordance with the plans of a state highway department. The following year Massachusetts created a department of public works; and California took like action the same year. From time to time, other states adopted a like

policy until in 1917 each state had either a highway commission, a department of highways, a department of public works, or a like authority with a different title.<sup>2</sup>

The policy followed by the states in developing state highway systems was given a strong impetus by the Federal Government in 1916, when Congress adopted the Federal Aid Road Act appropriating 75 million dollars to assist the states in constructing roads. The general purpose of the Act was gradually to bring into existence an interstate system of improved highways. The funds allotted to the states were to be spent upon roads approved by the Secretary of Agriculture, the amount contributed by the United States was not to exceed \$10,000 per mile of state road aided, and the state was to spend at least an equal amount per mile for the construction or improvement of the road. Later Congress fixed the maximum amount of Federal aid that might be given the states per mile of road at \$20,000, and the amount actually allotted by the United States Bureau of Public Roads was \$15,000 per mile. In 1934, Congress authorized Federal assistance to the amount of 50 per cent of the cost per mile of roads aided. The cost of maintaining the roads after they had been constructed was to be borne by the states. Moreover, in order to receive Federal aid in road construction, a state must have a highway department with the powers and equipment necessary for the adequate discharge of the duties of such a department.

The development of state highway systems, and, by means of them, a Federal highway system, was definitely provided for by the enactment by Congress in 1921 of the Federal Highway Act. This Act appropriated 75 million dollars that might be expended during the fiscal year 1922. Each state was required to lay out a system of state highways that was to include not more than 7 per cent of the mileage of roads in the state, and that was to be approved by the Secretary of Agriculture. The Federal Government has selected from the roads included in the state highways

<sup>2</sup> *The Motor Truck Red Book*, 1936 edition, contains a table, on p. 15, giving the name of each state's agency of highway administration and the date when each agency was established.

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those of most importance as parts of an interstate highway system and the roads thus designated have come to be known as the Federal Aid Highway System, which in 1934 had a total mileage of 207,231 miles. Up to June 30, 1932, the construction of about 120,000 miles of the roads included in the Federal Aid Highway System had been completed by the states with Federal aid. The total expenditures to date by the Federal Government in aiding the states in highway construction amount to about \$1,500,000,000; this, however, is but a small part of what has been spent upon local and state roads, and upon city streets.

In discussing highway policy and government aid to road construction, it is necessary to keep in mind the several categories of roads. There are national roads, state highways, county and township rural roads, and city streets. The United States Government has constructed about 5,000 miles of improved roads in Federal areas. The state highways have an approximate total mileage of 324,000 miles of which about 227,000 miles are included in the Federal Aid Highway System. The roads included in the state highway systems, however, include only a small part—about 11 per cent—of the total mileage of roads outside of the cities. The total mileage of so-called rural roads is somewhat more than 3,010,000 miles, of which nearly nine-tenths (about 2,660,000 miles) consist of local or secondary roads which in most states are constructed and maintained by the townships, counties, or county districts. North Carolina, in 1931, authorized its State Highway Commission to take over the construction and maintenance of the local (county) roads, and in 1933, West Virginia designated all county-district roads, with minor exceptions, as secondary roads and put them under the jurisdiction of the State Road Commission. In 1932, Virginia passed an act allowing the counties to turn their roads over to the State Department of Highways and 96 of the 100 counties took such action. In 1934 another county turned its roads over to the state. Oregon and Pennsylvania, in 1931, placed a part of their local roads in secondary systems of state highways. The streets within the limits of incorporated cities are a part of the country's highway system. Some city streets are parts of state and interstate thoroughfares. The total mileage of city streets in the United States

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is estimated to be about 260,000 miles.<sup>3</sup> There are altogether about 3,270,000 miles of highways and city streets in the United States.

The amounts that have been and are being expended upon the construction, and improvement and maintenance, of the several kinds of highways and the sources of the funds thus expended need to be considered in discussing highway policy and state and Federal regulation of highways. The main facts need be but briefly presented inasmuch as this discussion is concerned only with the relation of government to highway transportation and carriers and particularly with the government regulation of them. We are here concerned with only a part of what would be included in a general treatise upon highway transportation.

A concise statement of the amounts that have been and are being spent by the Federal Government, the states, the local county and township governments, and the cities upon state and secondary rural roads and upon city streets is difficult to make. The basic sources of information are the reports of the Bureau of Roads and of the Forest Service in the United States Department of Agriculture, of the National Park Service in the Department of the Interior, and of the Bureau of the Census in the Department of Commerce. Several calculations and estimates have been made from these sources, all of which show that funds made available for, and the actual expenditures upon, the different kinds of highways have been large and have been greatly increased since 1930. Data presented by Professor Sydney L. Miller in his scholarly volume upon *Inland Transportation*<sup>4</sup> show that the amount annually expended upon roads outside of municipalities in 1921 was somewhat less than one billion dollars, was somewhat greater than that amount in 1924, and was \$1,700,000,000 in 1931. These expenditures, moreover, did not include the interest paid upon state highway bonds of which the amount outstanding in 1930 was \$1,151,571,820. Professor Miller finds that for the 11 years ending with 1931, the total expenditures on highways outside of municipalities, not including interest on the road bonds,

<sup>3</sup> C. S. Duncan, in an article entitled "Who Pays For The Highways?" in the *Railway Age*, Aug. 13, 1932, Vol. 93, pp. 210-216, gives detailed statistics of the mileage of different kinds of roads and of the amount and sources of funds expended in their improvement for the eight years, 1923-1930.

<sup>4</sup> Pp. 575-576, Revised edition (1933).

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amounted to about \$13,750,000,000 of which about seven billion dollars (of which about 15 per cent was Federal aid funds) was spent upon the state highway systems, and the remainder upon local county and township roads. If the amounts expended upon the city streets during the 11 years be added the total would probably exceed 20 billion dollars.

A calculation of the amount of funds made available for highways for the eight years 1923 to 1930 has been made by Dr. C. S. Duncan.<sup>5</sup> During the eight years, the total funds available for state highways (of which the Federal aid highways are a part) were \$6,110,269,814, a little more than half of which (\$3,200,000,000) was derived from motor vehicle license fees and gasoline taxes, while most of the remainder was from state and county tax funds, from the issue of state highway bonds and notes, and from Federal appropriations. During the eight-year period, there was \$5,925,302,856 made available for other "rural" highways, of which total only \$710,622,166 came from license fees and gasoline taxes, while most of the total came from taxes—\$3,561,295,757—(mainly local taxes on real estate) and from the sale of road bonds and notes to the amount of \$1,129,211,865. Dr. Duncan estimates the amount spent on city streets during the eight years to have been \$6,640,291,138 of which only 3 per cent was obtained from "the use of automobiles and 97 per cent was from taxes and other sources."

The amount spent annually upon highway improvement and construction since 1930 has increased with accelerating rapidity, mainly as a result of the large expenditures of the Federal Government upon public works to provide emergency employment and for other purposes. The four sources of the funds by which the work was done were the state fees and taxes, the local taxes for county and township roads, the municipal taxes and levies upon property, and the several sources of aid by the Federal Government. In 1933, the state highway disbursement "for state road and bridge work under jurisdiction of state highway departments, principal payment on bonds and notes, transfers to local authori-

<sup>5</sup> "Who Pays For The Highways?" *Railway Age*, Aug. 13, 1932, Vol. 93, pp. 212-214.



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ties, and other disbursements''<sup>6</sup> amounted to \$782,006,127 of which total \$56,308,934 was for principal and interest upon outstanding highway bonds and notes, and \$42,797,410 was for transfers to counties and towns for local roads. The current state highway receipts for the same year including \$175,244,000 from the Federal Government were of about the same amount as the disbursements (\$764,264,000), but as there was a balance from the previous year's income of nearly \$191,000,000 the total funds available for expenditure were \$955,124,000. The main sources from which the states obtain the funds for expenditure upon the highways are automobile registration fees and gasoline taxes. The amount of state and Federal taxes paid in 1934 by the owners and users for automobile taxes were as follows:

### AUTOMOBILE TAXES FOR 1934 \*

State registration fees .....	\$ 312,929,000
State gasoline taxes .....	565,027,000
Personal property, city and county taxes † .....	70,000,000
Federal excise taxes .....	252,151,729
<b>TOTAL .....</b>	<b>\$1,200,107,729</b>

\* The total for 1935 was \$1,264,729,000. *Bus Facts* for 1936, p. 22.

† Estimated by the Automobile Manufacturers Association.

In addition to their receipts from automobile taxes the states have some other minor source of income for highway purposes. Twelve states collect small amounts in road tax levies, while all but three states have some revenue from miscellaneous sources, principally bridge tolls. With the exception of the relatively small share of the state highway receipts that is transferred to the counties and towns for local roads, the state expenditures for highways are for the roads within the state highway systems, which, as has been pointed out, include only about 11 per cent of the total mileage of roads outside of municipalities. The other 89 per cent of the mileage of "rural" roads is, with the exception of the roads in North Carolina, Virginia, and West Virginia, and in part in Pennsylvania and Oregon, maintained and improved mainly at the expense of the local tax payers. Prior to the business depression that began with 1930, the amount spent upon local roads, as

<sup>6</sup> *The Motor Truck Red Book*, 1936 edition, p. 654.

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has been pointed out, was equal to the amount devoted by the states to the state highway systems. Since 1930, the revenues from local taxation have been somewhat reduced, while the expenditures upon the state highway systems have greatly increased, the main sources of the funds thus expended being the fees and gasoline taxes paid by the owners and users of automobiles and the greatly enlarged appropriations by the Federal Government. This does not mean, however, that either the local rural roads or the city streets are being overlooked in the present program of highway development, for the Federal Government is appropriating and allotting funds to aid in improving secondary rural roads that are feeders to the state highway systems, and to assist in the reconstruction of streets by which the state highway systems enter or pass through the cities.

The past expenditures of the Federal Government in aid of highways have been liberal, while the recent and current Federal appropriations and allotments have been raised to a very high level by the program of public works intended to accomplish the dual purpose of providing emergency relief for the unemployed and of stimulating business activity. The appropriations providing Federal aid to the states for highway construction that were made by Congress from 1916 to 1930 amounted to 790 million dollars. In 1930, three appropriations were made totaling 300 million dollars. In 1932 an emergency relief fund of 200 million dollars to be used in aid of highway construction was appropriated. In 1933, the National Industrial Recovery Act made possible an allotment of 400 million dollars for aid to highway construction, and at the same time Congress authorized the expenditures of 50 million dollars for roads in national parks and other Federal areas. "The Hayden-Cartwright Act of June 18, 1934, provided 200 million dollars as a direct grant to the states on substantially the same terms as the National Recovery Act and also 24 million dollars for roads in national forests, national parks, and other areas under Federal Control." <sup>7</sup> The same Act also provided for 125 million dollars of Federal aid each year in 1936 and 1937. The following year, the Emergency Relief Appropriation Act of April 8, 1935, provided for the allotment of not more than 800 million

<sup>7</sup> Report of the Chief of the Bureau of Public Roads, 1935, p. 2.

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dollars for roads and streets, and for the elimination of grade crossings, and during the year 200 million dollars of that sum was allocated to aiding highway construction and another like sum for the elimination of grade crossings for which provision was made up to June 30, 1935. By adding the Federal appropriations and allotments, it will be found that the total amount prior to 1935 was \$1,964,000,000, while the appropriation made in 1935 for the two fiscal years 1936 and 1937 brings the aggregate to \$2,764,000,000, which sum has been allocated to, and used for, highway construction and the elimination of railroad grade crossings. The severe floods in the early spring of 1936 did serious damage to the roads in several states, and, of the allotments of Federal relief funds, a part was used in the reconstruction of the damaged highways and city streets. By the Act of June 16, 1936 Congress has authorized Federal aid to highways of 125 million dollars a year through 1938 and 1939.

Several important changes have been made since 1932 in the Federal policy of aiding highways. In order that more might be accomplished in highway construction and in providing work for the unemployed than would otherwise be possible, the statutory limitation of the Federal aid to state highways to \$15,000 per mile was removed and Federal aid up to 50 per cent of the cost was authorized. Federal funds may be allocated to the states for the improvement of rural or secondary roads. The funds made available for highway projects by the National Industrial Recovery Act could be and were expended not only on state highway systems and secondary or feeder roads, but also upon "extensions of the Federal-aid system into and through municipalities."

In 1934, the funds allocated to secondary road improvement were not to exceed 25 per cent of the total amount allotted to the states, and the Act of 1935 provided that not less than 25 per cent should be expended on rural secondary roads, and not less than 25 per cent within municipalities. Of the 200 million dollars appropriated by the Hayden-Cartwright Act of 1934, about 85 million dollars were allocated to the Federal-aid state highways, about 36 million dollars to the extension of the Federal-aid system into and through municipalities, and about 51 million dollars to secondary or feeder roads. Much larger allotments for municipal

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streets and secondary or feeder roads were made from Federal funds provided by the National Industrial Recovery Act, the amount of those funds expended on such projects that were completed up to June 30, 1935, being about 95 million dollars on 1,750 miles of city streets and nearly 80 million dollars on 7,948 miles of secondary or feeder roads. The works under construction June 30, 1935, included 1,019 miles of city streets for which \$41,183,364 of Federal funds had been allotted, and 4,018 miles of secondary or feeder roads for which \$49,427,680 of United States funds had been granted. The total amount of Federal funds spent and the work that has been accomplished from 1933 to 1936 is indicated by the following statement in the 1936 Annual Report of the Chief of the Bureau of Public Roads:

These several acts (of 1933, 1934, 1935) had resulted . . . in the construction of 38,220 miles of road at a total cost of \$636,622,561, of which \$571,276,033 was paid by the Federal Government, and there were under construction, or approved for construction, 17,862 miles additional, involving an estimated total cost of \$357,283,044, of which \$270,336,054 was Federal funds.

A considerable mileage of roads has been improved or constructed from funds provided in part by the Public Works Administration to afford relief to the people in 10 states that suffered from the drought and the grasshopper scourge in 1933 and 1934. In the 10 states, there had been 278 road projects, with a total mileage of 8,726 miles, undertaken up to June 30, 1935. The estimated cost of the completed works will be about 30 million dollars, towards which the Public Works Administration has allotted about eight million dollars. The United States Bureau of Public Roads, with the coöperation of the state highway departments assumed the responsibility of supervising the road work.

The Federal Government has also used funds at the disposal of the Public Works Administration to make "loans or grants or both" to 23 states to aid them in road construction. This was authorized by Section 203 of the National Industrial Recovery Act, and the loans and grants are in addition to the grants made for highway construction under the provisions of Sections 204 and 205 of that Act. Up to June 30, 1935, the Public Works Adminis-

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tration had made loan allotments of \$15,412,000 and grants of over 20 million dollars for projects including 4,400 miles of roads and involving an estimated total cost of nearly 56 million dollars. The administration of the expenditures of the allotted funds was in 1934 transferred to the Bureau of Public Roads by the Public Works Administration.

The foregoing detailed and possibly confusing summary of the several kinds of aid being given by the Federal Government to the states for highway improvements and construction will at least serve to show that for a present, and presumably temporary, program of providing country-wide public relief, the United States has not only greatly increased the rate at which highways are being improved and extended, but has also largely reduced the share of the total expenses that is borne by the states. If and when normal economic conditions again prevail, there will presumably be, and there should be, a return to the general highway policy that was followed prior to 1933, when the Federal Government's participation in highway construction, outside of national forests, parks, and reservations, was limited to giving the states some assistance in creating high-grade trunk-line highway systems which would, as a united whole, form a country-wide interstate system of highways usable throughout the year. Highway construction and maintenance should remain the chief concern of the states and of the appropriate political subdivisions thereof.

A larger expenditure of public funds is now being made for highway improvement and extension than can be justified, except as a temporary means of providing employment. The general policy that should be adhered to is to construct and develop highways in response to, and commensurate with, a definite need for the additional transportation facilities that will thereby be created. Moreover, in carrying out that policy it is equally important that the funds required should be obtained in accordance with sound principles and from those by whom the expenditures involved should be borne. Furthermore, it is essential in adopting and carrying out a highway policy to keep in mind the fact that the highways are a part of the country's general transportation system which also includes railroads, waterways, pipe-lines, and airways, each having a definite and appropriate place in that

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general system, and each capable of rendering a service of maximum efficiency and economy.

### FINANCING OF HIGHWAY IMPROVEMENT AND CONSTRUCTION

The expenditure of two billion dollars or more a year upon highways without and within municipalities makes manifest the importance of adopting and adhering to correct principles and practices in imposing the taxes and fees and making the levies required to obtain the large sums expended. As has been stated, nearly all of the funds used in maintaining and improving city streets are obtained from levies upon abutting or adjacent property and from general tax levies. The large receipts from state gasoline taxes go to the states, although the consumption of the taxed gasoline may be largely by vehicles operated upon the city streets. Recently the Federal Government has been bearing a part of the cost of improving the streets by which the Federal-aid state highways extend into or through municipalities. It seems only equitable that the state should allot to the municipalities a definite share of the funds received from gasoline taxes. The funds for the support and improvement of the 89 per cent of the mileage of the nation's highways outside of municipalities come mainly from local taxes upon property.

The study made by Dr. C. S. Duncan shows that, for the eight-year period ending with 1930, the receipts from "special motor license fees and gasoline tax" equalled only 12 per cent of the funds available for the secondary and rural highways, the remaining 88 per cent being obtained from other sources of taxation. As has been stated in this chapter, a few states have taken over the local highways and put them along with the main state highways under the jurisdiction of the state highway department. To some extent allotments of state funds are made to the counties or other political units for highway construction and maintenance. Moreover, from 1933 to the present the Federal Government through the Public Works Administration has made relatively large allotments of funds to aid in constructing secondary and feeder highways, the major purpose being to distribute relief employment over a wide territory.

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The main source of the funds used by the states in constructing and maintaining the state highway system has been the automobile registration fees and the state gasoline taxes, the revenues from these sources being supplemented by general taxes and by state highway loans, payments of the interest and principal of the loans being borne in large part, but by no means entirely, by the receipts from vehicle registration fees and gasoline taxes.

In general, highway users pay for the major share but not all of the costs of the state highway systems, comprising about 11 per cent of the highway mileage outside of municipalities; the secondary or feeder and local highways, which include about 89 per cent of the road mileage not within municipal limits, are constructed and maintained mainly from funds derived from property taxes; and the funds for city streets are obtained mostly from property levies and taxes. All three classes of highways, the secondary rural highways, and certain of the main city streets, as well as the roads in the Federal-aid state highway systems, have been receiving aid from funds made available by Congressional appropriations and by allotments made to provide employment and afford relief to the needy. The sources from which the United States derives its funds are the various and increasing kinds of taxes levied.

The policy that should be followed in financing highway construction and maintenance has been much debated. A statement of the policy and principles that should be controlling in levying taxes for highway purposes—and a statement to which especial weight may wisely be given—is one that was made by the Joint Committee of Railroad and Highway Users. This committee was organized in the autumn of 1932 and consisted of six representative railroad officials, appointed by the Association of Railway Executives, and of six men selected by the National Highway Users Conference to represent the users of automobiles and highways. In its investigation and deliberations the committee had the assistance and counsel of Professor William J. Cunningham of Harvard University, who served as Executive Secretary, and of two special assistants, Dr. C. S. Duncan, Economist of the Association of Railway Executives, and Mr. Pyke Johnson, Vice-President of the National Automobile Chamber of Commerce. At the end of January, 1933, the Joint Committee made a report

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upon the Regulation and Taxation of Highway Transportation. While the members representing the railroads and those representing the highway users held different opinions concerning several phases of government regulation of motor carriers and transportation, the Committee reached a unanimous finding as to the principles and practices to be followed in assessing fees and levying taxes to secure the funds required for the construction and maintenance of highways. It made the following recommendations concerning "taxation":

The total amount of taxes to be collected should be determined by the annual highway budget [of the state]. . . . The annual cost of highways should include administration, maintenance, interest charges on highway debt, and amortization of capital expenditures. . . .

The budget [of highway expenditures] should take into account the economic requirements of (a) administration; (b) maintenance of existing highways; (c) interest on outstanding highway debt; (d) amortization or replacement charge; and (e) improvement of existing highways and/or construction of new highways. . . .

Projects for improvement of, or additions to, existing highways should not be undertaken unless traffic surveys and/or other careful studies indicate economic justification.

The conclusion reached by the Joint Committee as to the share of the total cost of improving and maintaining highways of different classes that should be borne by the owners and users of motor vehicles was especially significant. It was that:

Motor vehicles should pay the entire cost of the state highway system. They should also pay a part of the cost of county and/or township highways, that part to be determined by the extent to which such county and/or township highways are in general rather than local use. Furthermore, motor vehicles should contribute in part to the cost of arterial routes through cities. The classification of highways between those of general use and those of local use, and the determination of the extent to which special motor vehicle taxes should be used to pay part of the cost of arterial routes through cities, should be made by the authorities in each state in the light of its local conditions.

A difficult problem to be solved in levying taxes and imposing fees upon motor vehicles is that of dividing the burden equitably among the several types of vehicles used. The rules that the Joint Committee recommended the states to follow were that:



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The apportionment of special taxes among motor vehicles of various types should be based upon use of facilities required, and [the charges imposed upon the several kinds of vehicles] should be sufficient [to cause each and all types] to pay their fair share of total annual costs. . . . Separate schedules should be determined for passenger automobiles, buses, and trucks.

The basic cost of constructing, improving, and maintaining a given highway should be determined from a highway designed for private passenger vehicles and other vehicles commensurate therewith. All vehicles using such highways should pay their proportional share of that total as a base tax. The total additional cost of construction, improvements, and maintenance to make a road suitable for a type of vehicle requiring such additional cost should be shared by each vehicle of that type and each vehicle of greater size. Thus each group should share in the base cost plus all increments of cost up to and including cost required by it.

The Joint Committee's recommendations as to the fees and gasoline taxes that should be levied upon passenger automobiles, buses, and trucks were that:

For passenger automobiles, there should be (a) a registration fee, graduated according to weight or horsepower, and (b) a gasoline tax.

For buses and other vehicles carrying passengers for hire, there should be (a) a registration fee, based on mileage operated and graduated according to seating capacity, and (b) a gasoline tax.

For trucks there should be (a) a registration fee graduated so that it will increase more than directly with weight, and (b) a gasoline tax.

As regards the use of the receipts from taxes on motor vehicles only for highway expenses and the avoidance of the evasion of taxes by purchasers of gasoline, the Joint Committee expressed the opinion that:

Special taxes levied upon motor vehicles using highways should be devoted entirely to highway purposes. There should be no diversion of such taxes in any degree to any other purpose [and] gasoline taxes should not be so high as to encourage evasion.

Another committee whose views regarding highway financing may well be given weight was the National Transportation Committee, which was organized in October, 1932, and which submitted its report in February, 1933. The Committee served at the request of a large number of savings banks, insurance companies, some business associations, and some universities. The Committee was asked to examine all phases of the railroad problem and to

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recommend a policy by which "the railroads of this country [may] be put upon a business basis, so that neither now nor in the future will they constitute a present threat to the invested savings of our citizens, to loss of employment to our wage-earners, and to the stability of the insurance companies and the savings banks." The Committee consisted of Former President Calvin Coolidge, who served as chairman until his death, Bernard M. Baruch, Vice-Chairman, Alfred E. Smith, Alexander Legge, and Clark Howell. To do its research work the Committee selected Dr. Harold G. Moulton who was assisted by the staff of the Brookings Institution of which Dr. Moulton is President. The general conclusion reached by the Committee concerning taxes that should be paid by the users of highways was that:

Automotive transportation . . . should bear its fair burden of tax, but only on a basis of compensation for public expenditure on its behalf, plus its share of the general tax load. Neither tax nor regulation should be applied for any purpose of handicapping the march of progress for the benefit of the railroads.

In discussing this statement of principle the National Transportation Committee states that "our studies clearly indicate that in some states automotive vehicles do not bear their full burden of taxes. We think they should pay the carrying charges and cost of maintenance of the highways they use and also their share of the general tax load." A similar view was also expressed by Dr. Moulton in the volume upon *The American Transportation Problem* (p. 568) which presents the material which he and his associates prepared for the Committee. Dr. Moulton refers to, "The fairness of the principle that the users of highways should contribute to the general support of the government proportionately with competing agencies," and states that, "In accordance with this principle there should be included in the cost of highways a charge equivalent to the property taxes which would be imposed upon the real estate represented by the highways, if the real estate were privately owned."

The foregoing statement of conclusions reached by the Joint Committee of Railroad and Highway Users and the National Transportation Committee deals with controversial questions. At the present time, in some of the states, a part of the expense of

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constructing and maintaining the state highway system is borne by those who pay general taxes. Some funds thus used are raised by state highway taxes and it has also been the practice of several states in the past to devote some of the receipts from general taxes to the payment of the principal and interest of state highway loans. Highway loans during recent years have been made a charge upon motor tax receipts. On the other hand, there are some states in which the revenues obtained from motor registration charges and from gasoline taxes are equal to the amount spent upon state highways; and, during the recent heavy demands upon the states for relief for the unemployed, several states have diverted to other than highway purposes a part of the receipts from motor registration fees and from gasoline taxes. As regards the country as a whole and highways in general the users of the highways pay the larger part of the cost of the state highways and but a minor part of the expense of the secondary or local county and township roads.

There is real need not only of greater uniformity in highway financing on the part of the states, but also that the states adopt and adhere to sound principles in levying highway taxes and in using the proceeds thereof in the construction and maintenance of roads. The Joint Committee of Railroads and Highway Users enunciated a sound principle when it stated that motor vehicles should bear the entire cost of the state highway system and should also contribute to the cost of providing and maintaining the secondary or local county and township roads to the extent to which such roads "are in general rather than local use," and that "motor vehicles should contribute in part of the cost of arterial routes through cities."

The Joint Committee, likewise, makes a sound proposal when it recommends that motor vehicles of all types should share in meeting the cost of a basic highway "designed for private passenger vehicles and other vehicles commensurate therewith," and that the additional expense of providing and maintaining roads suitable for the users of buses and trucks should be borne by such vehicles, each type of which should bear a proportional part of the additional cost. How to determine the schedule of special graduated charges that should be levied upon buses and trucks

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of differing kinds is a technical problem to which no little study has been given and concerning which research is now being carried on by some of the state highway departments and by the United States Bureau of Public Roads.

One essential requisite of wise and efficient taxation for highway purposes, and of the economical expenditure of the funds derived from taxation, is the establishment and maintenance by each state of an appropriate and efficient administrative agency or authority having state-wide jurisdiction. The views expressed by the Joint Committee of Railroads and Highway Users concerning the administration of a state policy regarding highway taxes and the expenditure of funds for highway construction and maintenance are worthy of special consideration. Improvement in highway administration is much needed. As the Joint Committee says:

Our highways are now under the jurisdiction, responsibility, and control of different governmental units, such as the state, county, and the town or township. Cities have jurisdiction over and are responsible for city streets. There should be as complete administrative coordination as possible between these governmental units, to the end that there may be realized the utmost in efficiency and economy in highway expenditures.

The only effective means to centralize authority, to simplify the problems of imposing and collecting charges for highways of general motor use, to prevent unreasonable duplication of charges, and to insure expenditure of the special motor vehicle funds on highways of general motor use economically justifying such expenditures, is to have the state progressively take them over. The state should be the sole agency for special automotive taxation.

The foregoing emphasis upon the importance of as complete coordination as possible among the state, county, township, and city authorities in the administration of the work of constructing, maintaining, and improving highways is most timely. The organization of government in the states is such as to divide jurisdiction among the state, county, and other local political units and thus to weaken the efficiency of highway administration. Formerly, when the roads were little used except for local transportation and travel, this did not greatly matter; but when, as at present,

the highways have become facilities used by millions of private automobiles and by a large and increasing volume of state-wide and interstate passenger and freight traffic, and when the secondary and local roads have become feeders, and complements, of the main highways, the major and minor highways being interdependent components of a general coördinated system, it becomes manifest that there should be either unified or closely coördinated administrative authority over the highways in each state, and that the states should enter into reciprocal agreements with each other concerning matters affecting the interstate use of highways.

That the states generally should follow the example set by North Carolina, Virginia, and West Virginia and give their state highway department complete jurisdiction over all roads outside of municipalities may not be necessary or advisable. It may be possible to make highway administration efficient and economical by close coördination of state and local authorities. What policy should be followed will doubtless be determined experimentally; but it would seem certain that each state should have a definite *state* highway policy, that the state highway department should have authority to carry out that policy, and that the activities of the county or other local highway authorities should be under the supervision, and subject to the higher administrative jurisdiction, of the state highway department.

As regards the levy and collection of special fees and taxes upon motor vehicles and the use that shall be made of the funds thus obtained, it is clear that the state should have jurisdiction. Thus only will it be possible "to prevent unreasonable duplication of charges," and to insure the wise and economical expenditure of funds in the development of a general highway system that will best meet the needs of the public for local and long-distance highway facilities. That the state highway departments may function efficiently through the local authorities in the construction and maintenance of secondary and local roads—the central state authorities having supervisory jurisdiction and control—may be possible; and when and where that is possible it will not be necessary for the states to vest in their state highway departments sole jurisdiction over all roads outside of the municipalities. Mani-

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festly each city must retain control over its streets, while receiving from the state its due proportion of the revenues received by the states from motor vehicle fees and taxes.

### CONCLUSIONS

An outstanding fact regarding the development of highway policy in the United States has been the trend from highway construction and administration by local political units, which prevailed nearly to the end of the nineteenth century, first, to the creation of state highway systems, as parts of the much larger mileage of roads in the states, and then, beginning in 1916, to the formation of a national system of roads composed of the coördinated Federal-aid state highway systems. This trend and the accompanying increasingly large expenditure of public funds upon highway construction, improvement, and maintenance have been the result mainly of the demand for highways suitable for automobiles, buses, and trucks, the number, size, and speed of which have increased rapidly with the technical improvements in motor engines and vehicles. The application of mechanical power to road vehicles has made the highways the country's most used agency of transportation. The development of state and interstate highways that has made possible this large use of the roads has fundamentally changed living conditions and social organization in the United States.

The states having developed high-grade state highway systems, having a total mileage of nearly 325,000 miles but comprising only about one-ninth of the more than three million miles of roads outside of municipalities, are now, perforce, concerning themselves more and more with the 89 per cent of the nation's entire road system that is included in the secondary or feeder roads and in the other local county and township roads. The importance of coördinating and rounding out the country's road system as a whole is being increasingly recognized.

The highway policy that has developed and is in the making requires the solution of difficult problems of state taxation, and also of administration. Highway construction and maintenance require the expenditure of such large sums that it becomes im-

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perative to adopt wise measures of highway taxation and to provide for the efficient and economical administration of the expenditure of the funds.

The present major sources of the funds used in creating and maintaining the state highway systems are motor vehicle registration fees and gasoline taxes. Funds for improving and caring for county and township and other secondary roads come chiefly from property taxes. In the foregoing discussion, approval has been given to the principle laid down by the Joint Committee of Railroad and Highway Users that, "Motor vehicles should pay the entire cost of the state highway system [and that] they should also pay a part of the cost of county and/or township highways, that part to be determined by the extent to which such . . . highways are in general rather than local use." This would require the shifting of a part of the burden of providing and maintaining local highways from those who pay taxes on land and other local property to those who use the local highways as parts of the state's road system as a whole.

A problem of state highway policy that is yet but partly solved is that of centralizing in the appropriate departments of the state governments the administration of the levying and collecting of taxes to secure highway funds and of the application, or allocation and use, of those funds for the improvement and maintenance of the several kinds of highways. Some states have taken full jurisdiction over highway construction. This may ultimately prove to be the better policy for all states to adopt, but there is much to be said in favor of the states' functioning administratively through their county or other local political units in carrying out the state highway policy. While, in general, concentration of authority contributes to administrative efficiency, there are also advantages to be gained by making use of local administrative agencies, when there is a well-defined policy to be carried out, and when the activities of the local agencies are carried on under the supervision and higher authority of a single department having state-wide supervisory jurisdiction. However, if the states do not assume full jurisdiction over highway affairs to the exclusion of the county and township authorities, care must be taken to provide "as complete administrative coördination as possible between

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these [local] governmental units'' and the state authority. There should also be coördinated action on the part of the state highway authorities and the cities regarding the improvement and maintenance of those streets by which the state highway system enters or passes through the cities.

The present extensive aid being given to the states by the Federal Government, not only for the Federal-aid roads included in the state highway systems but also for the secondary or feeder roads and for city streets, raises the question as to what should be the permanent highway policy of the United States Government. Presumably the present policy of sharing the expense of constructing local roads scattered over the country and of allotting funds to the states for aiding in the improvement and maintenance of city streets has been adopted as a temporary measure that will be given up when "emergency relief" no longer need be provided. It is, however, much easier to start giving than to stop giving; and the recipients of assistance are not easily persuaded that they should no longer be aided. In a democratic country, so organized politically as the United States has come to be, the obstacles to be overcome in retrenching appropriations and expenditures are not easily surmounted. The participation of the United States Government in highway construction and maintenance should not go beyond providing appropriate roads in national areas, parks, and reservations, and in aiding the states in creating and improving such major units of the state highway systems as are essential component parts of a needed interstate or country-wide highway system. The Federal Government should readopt the highway policy by which it was guided prior to 1932. Highway taxation policies and the administrative procedure to be followed in highway development and improvement are problems to be solved by the states with the coöperation of their political subdivisions.

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## CHAPTER XXI

### REGULATION BY THE STATES OF HIGHWAY TRANSPORTATION AND CARRIERS

TRANSPORTATION in the United States, whether by rail, road, water, or air, is partly intrastate and partly interstate. Organized transportation by air is by its very nature almost entirely interstate; and that by water, coastwise, on the Great Lakes and on the rivers, is mainly between points in different states, the principal exception being the local transportation of materials used in the heavy industries and in construction works at points on or close to waterways. Railroad freight transportation is largely interstate, while the highways are used much more for local and intrastate transportation than for interstate. Long-distance highway travel and traffic have increased with the improvement and extension of roads and the development of motor vehicles and as a result of the sharp competition among carriers by rail, road, and water, each struggling to carry on during a period of business depression and greatly reduced traffic.

#### THE PROBLEM STATED

Government regulation of highway transportation and carriers in the United States has been, and must continue to be, a task to be performed in large part by the states and municipalities. Highways being state ways and city streets, the states and municipalities can adopt and enforce regulations as to their use; moreover, the so-called police powers of the states, by which the safety and interest of the public are protected, may be exercised over all users of, and carriers upon, the highways, interstate as well as intrastate. While the states may not prevent or unreasonably burden interstate commerce upon the highways they may in the interest of public safety and convenience enforce reasonable rules as to motor vehicles that may be used, their speed, their

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weight, and traffic; and the states may impose like taxes upon interstate and intrastate carriers.

All of the 48 states have made provision for the regulation of intrastate highway transportation and carriers. The District of Columbia, also, regulates the operation and use of motor vehicles in the District. With 49 different legislative and administrative jurisdictions and authorities, there could hardly be uniformity of policy and practice; indeed, there is much difference among the states regarding both the general scope of regulation and the things regulated. This is readily explained not only by the fact that like action, not to mention uniformity of action, is hardly to be expected of 49 legislative authorities acting separately concerning problems that vary somewhat with different sections of the country, but also by the fact that, while all of the states and the District of Columbia have now provided for a greater or less measure of regulation of highway transportation and carriers, most of them have taken action within the last few years. The following generalizations made in 1934, in the instructive discussion of "The Present Regulation of the Motor Carrier Industry" contained in a report upon the Regulation Of Transportation Agencies,<sup>1</sup> made by the Coördinator of Transportation, correctly summarize the situations as of that date and of the present:

As to most States, regulation of motor carriers is still in process of evolution and hence, taken as a whole, is characterized by considerable instability, by a lack of uniformity, and by marked differences in the results achieved.

The experiences of the individual states, however, have established certain basic principles and facts, have made clear the chief obstacles to effective regulation, and have indicated in large measure the course that must be followed if regulation is to achieve greater success than it has to date. Certain of the states have a record of solid achievement.

Some indication of the recency of regulatory legislation and of the broadening of its scope is given by the fact that only 18 of the 49 authorities (48 states and the District of Columbia) had provided for the regulation of common carriers by motor prior to 1931, the remaining 31 having since taken action. Prior to 1931,

<sup>1</sup> Senate Document No. 152, 73rd Congress, 2nd Session, p. 191, March, 1934.

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only one state had enacted laws relating to contract and private motor carriers. At the present time the majority, but not all, of the states regulate intrastate contract carriers; but only a few of the states regulate private carriers using the public highways for the transportation services connected with the conduct of their industrial activities. However, the rapid development of motor transportation, the consequent intense, and often destructive, competition among motor carriers and between highway and railroad carriers, which has been made more acute by the shrinkage in total traffic caused by the prolonged business depression, and the enactment in 1935 by the Federal Government of a comprehensive motor-carrier statute which provides for the regulation not only of interstate common carriers but also of contract carriers, and to some extent of private carriers, have stimulated the states to accelerated activity in the enactment of new laws and in the revision and extension of existing statutes concerning the regulation of intrastate motor carriers of all classes.

Taken as a whole, this legislative activity is following three general trends: new classes of carriers and agencies of highway transportation are being regulated; the degree and scope of regulation of the several classes of carriers are being increased; and, most fortunately, there is evidence of a definite purpose on the part of the states to bring about a greater uniformity in their regulatory statutes. The goal of general uniformity is manifestly a distant one, but progress on the road thereto has been quickened by the Federal Government's enactment of the Motor Carrier Act of 1935, which sets up a standard and a model that is already noticeably affecting state legislation concerning intrastate motor carriers.

Evidence of the influence of national upon state legislation for the regulation of motor carriers was discernible very shortly after the enactment of the Federal Motor Carrier Act of August 9, 1935. In the analysis and summary presented in "Motor Vehicle Legislation, The 1935 Trend" published in December, 1935, by the National Highway Users Conference, the statement is made that "many states are now giving consideration to state regulatory laws which parallel the Federal statute," and that "where

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the Federal statute goes farther than does the regulatory law of a state, there will be a tendency towards further enlargement of local power. The trend is definitely in the making." In the same summary, reference is made to the fact that some states have not provided for the regulation of the contract carrier by motor because of the "past assumption" that his business was based upon private contracts between himself and those individuals he served; and the statement is made that, the Federal Government having adopted a statute for the "complete regulation of this class of carrier . . . bills to parallel this feature of the Act have already been prepared in some states." The statement also makes note of the fact that, "The regulation of the private carrier—the man who transports his own property in his own vehicle—is attempted so far in only one or two states," while "the Federal statute provides for his regulation as to matters of safety of operation, hours of service of employees, standards of equipment, the keeping of records and accounts, the filing of reports, et cetera"; and the statement then adds that "the extent to which legislatures of the states can be induced to follow this lead depends somewhat upon the success of this phase of the Federal Act."

The regulation of highway transportation and carriers by the states must necessarily deal with a large number of subjects. In the following discussion, which must needs be made as concise as practicable, it will be well to consider, first, the scope that has been given such regulation by the states up to the present time. In doing this it will be well to point out the additional regulation necessary to an adequate and effective accomplishment of the results desired; and, inasmuch as most states have provided for the regulation of motor common carriers, the discussion of additional regulation will relate principally to contract and private carriers.

Carriers upon the highways are engaged in interstate, as well as intrastate, transportation. Each state has jurisdiction over intrastate carriers, and also has authority to prescribe and enforce reasonable rules and regulations to be observed by all users of its highways, whether they be intrastate or interstate carriers. However, the Federal Government, by virtue of its power to

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regulate interstate commerce, has authority over interstate carriers which are thus subject to regulation both by the states and the United States. Because of the fact that motor carriers are subject to regulation by the Federal Government and by the states it will be necessary, in the following discussion of regulation by the states, to define as clearly as may be the basis and limitations of the regulatory powers of the states. The limitations upon the authority of the states are determined in part by the personal and property rights that are guaranteed to all citizens by the Federal Constitution, and in part by the power that the United States has, under the Commerce Clause, to regulate interstate commerce and carriers, a plenary power that cannot be restricted by a state in its exercise of authority within its field of jurisdiction.

The discussion of the actual and desirable scope of the regulation of motor carriers by the states, and the definition and explanation of the regulatory powers which the states may exercise, will be followed by a brief statement of the principles and purposes that should be controlling in the exercise of their powers. The chapter will close with a summary of the general conclusions that the discussion seems to warrant.

### GENERAL SCOPE OF THE REGULATION OF HIGHWAY TRANSPORTATION AND CARRIERS BY THE STATES

Government regulation of motor carriers, whether by the states or the Federal Government, is concerned with three kinds of carriers, common, contract, and private, and with the agents or brokers that act for the carriers. Since the three classes of carriers have functions and services that differ and that must needs be considered in their regulation by the Government, it will be well to define each class. The statutes of the states vary as to the designation given, and the definition of, different kinds of motor carriers. The authors of the excellent discussion of "The Regulation Of The Motor Carrier Industry,"<sup>2</sup> prepared for the

<sup>2</sup> This constitutes Appendix B, pp. 170-255, of *Regulation of Transportation Agencies*. The definitions are on pp. 172-173. Senate Document No. 152. 73rd Congress, 2nd Session (1934).

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Coördinator of Transportation, selected the definitions contained in the statute of the State of Oregon (Ch. 429, Oregon Laws, 1933). These definitions are specific and satisfactory, and may well be quoted here. They are as follows:

*Common Carrier.*—Any person who transports for hire, or holds himself out to the public as willing to transport for hire, compensation, or consideration, by motor vehicle, persons or property, or both, for those who may choose to employ him.

*Contract Carrier.*—Any person engaged in transportation by motor vehicle of persons or property, or both, for hire, under special or individual agreements or leases, and not included in the term "common carrier."

*Private carrier.*—Any person engaged in the transportation by motor vehicle of property sold or to be sold by him in the furtherance of any private commercial enterprise, or property of which such person is the owner, lessee, or bailee, when transported for the purpose of lease, rent, or bailment.

Similar, but somewhat more detailed, definitions of the three kinds of motor carriers are given in the Federal Motor Carrier Act of 1935, which also defines a motor transportation agent or "broker" as a person who is not a motor carrier (as defined by the Act) and is not an employee or agent of such carrier, but who "holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for" transportation by motor carriers. Since 1932, a few states have provided for the regulation of motor freight brokers, such regulation being necessary to prevent secret rate-cutting and unjust discrimination. Doubtless the example set by the Federal Government will soon cause more states to regulate such brokers by requiring them to obtain certificates permitting them to engage in business and by compelling them to conform to statutory requirements.

As has been stated, all of the states have enacted laws for the regulation of motor common carriers. In a few states common carriers of property are as yet subject only to safety and operating rules applying to equipment and drivers, there being no regulation of rates and services. Moreover, as has been indicated, there is much variation in the degree of regulation exercised by different states, but, while complete uniformity is not to be ex-

pected, the dissimilarities in the state laws are certain to become less as the evolution of regulatory policy proceeds. It is not surprising that the regulation of passenger motor carriers by the states should have proceeded faster and somewhat farther than has the regulation of property carriers, whose number is far greater than the number of passenger carriers and whose operations are of many kinds, are carried on throughout the country, and are consequently difficult to police and to regulate.

In the past the general public, in some states and sections of the country, has been relatively indifferent concerning the enforcement of laws and administrative rules applying to motor carriers of freight. The attitude of the public is changing as a result of increasing highway congestion and a more general understanding of the purpose of government regulation. The fact that 34 states, in 1935, amended their motor regulatory laws to broaden them in scope, or to strengthen them, is indicative of a more general recognition of the necessity of effective state regulation of motor carriers. Moreover, it is probable that the administration of the Federal Motor Carrier Act of 1935 will not only influence legislative action by the states but will also tend to vitalize the enforcement of state laws. It will be most fortunate if such should prove to be the course of events.

The past laxness in the enforcement of the regulation of motor common carriers has been due in large part to the tardy recognition of the fact that "there can be no effective regulation of motor carriers of property without including contract carriers within the scope of regulation."<sup>3</sup> Effort to apply regulation only to common carriers causes a large part of the present and possible traffic of common carriers to be taken from them by the unregulated contract carriers, with the effect of disposing common carriers to seek to evade the requirements of the law and of inclining state commissions to be lenient in the enforcement of statutes. Since the decision of the United States Supreme Court, December 5, 1932, in *Stephenson, v. Binford* (287 U.S. 251), definitely upholding the power of the states to regulate contract carriers as definitely and nearly as fully as common carriers may be regulated, the number of states regulating motor contract

<sup>3</sup> *Ibid.*, p. 193.



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carriers has rapidly increased; and, now that the Federal Government has undertaken the regulation of such carriers, the states that have not yet acted may be expected to legislate in the near future.

Whether, when, and to what extent the states, nearly all of which have not yet acted, will apply to private carriers by motor the regulations other than those concerning safety, that are applied to all owners and users of motor vehicles, will doubtless be determined by the results achieved by the United States in administering the Motor Carrier Act of 1935 which gives the Interstate Commerce Commission authority, "To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

One interesting and especially significant fact regarding both the scope and purpose of the regulation by the states of highway transportation is that the states are concerning themselves more and more with the use that may be made of their highways, with determining who may use the public roads and for what purposes. The concept that the public road is the "king's highway," the open road, that all may use in the way they may desire, is changing. The highways are becoming, indeed have become, commercial thoroughfares that are used for the conduct of the business of transportation. Common, contract, and private carriers are using the public highways as a facility for their business operations, and by so doing they not only add greatly to the cost of providing and maintaining highways but they also interfere with, and make dangerous, the use of the highways by the general public. If the use of the public highways as commercial thoroughfares upon which business enterprises may be organized and carried on is not regulated, the result may be an unnecessary and socially undesirable congestion of the highways while other transportation facilities and agencies, those by water and by railroad, the prosperity of which is of vital interest to the public, may be unable to maintain, develop, and improve their facilities and the services that are essential to public welfare.

By its Motor Carrier Law of 1931, Texas took the lead in pro-

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viding that the state's entire transportation system should be considered in the regulation of motor carriers. The law stipulated, as the laws of the states generally provide, that a contract carrier must obtain a permit before beginning operations, and that the commission having jurisdiction shall not grant a permit if it "shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory" as the applicant proposes to serve. In upholding the statute in deciding the case of *Stephenson v. Binford*, above referred to, the Supreme Court very definitely held, in effect, that the State of Texas in regulating highway carriers could prevent the overburdening of the highways by the undue diversion of traffic from the railroads. The Court stated that:

The evidence contained in the record conclusively shows that during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by the railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly the amelioration or removal of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the states legislative power.

Regulation of motor transportation must needs include several subjects. In addition to deciding what carriers may use the highways, the state must concern itself with the kind of equipment that may be used, and with the qualifications of those who operate the equipment—there must be registration and licensing of all motor vehicles and of drivers. There must also be rules as to the permissible size and weight of vehicles and their loads, and as to the speed at which they may be driven. Municipalities and other local governments may, and do, establish and enforce such traffic rules as they consider to be necessary. The requirements of the several states as to the size and length, weight and speed of vehicles still vary largely, although the United States Bureau of Public Roads, the National Conference on Street and Highway Safety, the National Highway Users Conference, and other in-

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terested organizations are having some success in reducing the differences in the state and local regulations. Complete uniformity in the motor traffic and safety regulations of the states is hardly to be expected and is probably not advisable at present, because traffic conditions are unlike in different states, and also for the reason that the states have not all constructed the same type of highways.

Closely related to the safety regulations just referred to are the statutory and administrative requirements of the states as to hours of labor of truck and bus drivers. All but six of the states had, by 1935, placed a limitation upon the number of consecutive hours that drivers may lawfully be on duty. The maximum working hours thus permitted varied from 7 to 14, the more usual number being 10 or 12. Some of the regulations stipulate both the number of consecutive hours of labor permissible and also how many hours men may serve within a 24-hour period, the required hours for rest between service periods being stated in some instances and in others not designated.<sup>4</sup> That there should be regulation of the maximum consecutive hours that drivers of trucks and buses may be on service and the number of hours that they may be on duty during a 24-hour period is manifest; and it is equally evident that the statutes and regulations of some of the states are unduly lenient. This is a phase of the regulation of motor transportation to which the states have but recently given attention, all of the state statutes upon the subject having been enacted in 1931 or later. As the Interstate Commerce Commission proceeds with the exercise of the authority it has been given to prescribe the maximum hours of service not only for interstate common and contract motor carriers but also "for private carriers of property by motor vehicle," the action taken by the Commission will doubtless be followed by many, if not by all, of the states.

The adoption of statutory or administrative requirements by the Federal Government or the states as to permissible hours of labor by motor drivers is only the first step in accomplishing actual regulation. The administration and enforcement of re-

<sup>4</sup> Consult *The Motor Truck Red Book*, 1936 edition, pp. 84-86, for a summary of the maximum working hours of drivers of motor-cars.

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quirements in this phase of regulation presents an especially difficult problem, one that has thus far been but partially solved. Indeed, the satisfactory enforcement of regulations as to hours of service can probably be accomplished only as the business of motor transportation becomes well organized, as ethical standards become definite, as business practices become more standardized, and as the authorities charged with the administration acquire greater efficiency with experience and with the added support they will receive as the public comes to realize more fully the social value of the effective regulation of all of the several agencies of transportation.

The general scope and characteristics of the state regulation of motor carriers are largely determined by the conditions that must be met by a carrier in order to secure the certificate or permit that must be obtained before beginning operations. Nearly all states require motor common carriers to obtain from the state regulatory authority a certificate of public convenience and necessity; in a few states the authorization is called a permit. Contract carriers are usually obliged to obtain a permit, but some states require such carriers to secure a certificate. While the requirements of the states are not uniform, it is the general practice to require applicants for certificates or permits to file their petitions in writing and to set forth therein such detailed information as the statute or regulatory authority may require. It is the practice of the state authorities to give notice of such an application to other carriers, motor, steam, and electric, that are operating in the territory or over the routes to be served by the applicant, and to conduct a public hearing if opponents wish to be heard. In deciding whether the application shall be granted, the state authority gives consideration and appropriate weight to a number of factors. In the motor-carrier acts of some states, as in that of Texas, the factors to be considered are specified and set forth in detail, while in other statutes the instructions given the regulatory body are more general. Briefly stated, the main factors to be considered are: <sup>5</sup>

<sup>5</sup> Consult *Regulation of Transportation Agencies*, pp. 178 *et seq.*, Senate Document No. 152, 73rd Congress, 2nd Session, also *Motor Vehicle Legislation, The 1935 Trend*, published by the National Highway Users Conference.

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1. The financial responsibility of the applicant. The applicant must be financially able to perform the proposed service, and must be able to file such indemnity bonds or obtain such insurance as the state authority may deem necessary "to afford reasonable security to patrons and the public against injuries or losses" that may result from the proposed operation. All of the states require such indemnity bonds or insurance of common carriers and the majority of the states make such requirement of contract carriers. It should be the practice of all states to insist that both classes of carriers should make such provisions for the protection of their patrons and the public.

2. Condition and character of equipment and facilities. The reasons for this are obvious. The state authority should pass upon the equipment that the applicant may use upon the highways of the state. Moreover the registration fees payable and the taxes to be paid by the applicant will depend upon the type and character of equipment used.

3. The service that the applicant proposes to perform, whether common or contract, passenger or freight service, whether it is to be "permanent and continuous throughout the year."

4. The "public convenience and necessity" of the proposed service. An abstract and generally applicable definition of what is in the public interest is not possible. While the state statutes often enumerate the factors to be considered in reaching a decision concerning the public interest, the statutes also give the regulatory authority much latitude, and specify that "all other pertinent matters" shall be taken into account. More is required by most states of common carriers seeking certificates than of contract carriers applying for permits; but a few states require contract, as well as common, carriers to furnish affirmative proof of the public convenience and necessity of the proposed service. In addition to considering whether the service that the applicant proposes to perform is *per se* meritorious and in the general interest of the public there are at least the two following practical considerations to which weight must be given by a state authority in deciding upon an application.

5. What effect will the performance of the proposed service have upon the highways of the state and upon the present traffic

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upon them? During recent years the speed of motor vehicles has increased and their size, weight, and loads have grown larger. Consequently there is now a noticeable tendency for statutes to give, and for administrative authorities to exercise, greater administrative discretion in deciding what kind of equipment may be employed upon the state highways and what services may be performed thereon. The states have made and are making large investments in their highways and are incurring heavy expense in maintaining them. Moreover, the public has an interest not only in the proper and safe use of the highways, but also in the perpetuation and further development of other transportation facilities and agencies. It is in the public interest that the state regulatory authority should protect the highways against improper or unnecessary use.

6. In deciding upon the public convenience and necessity of a proposed motor-carrier service it is necessary to consider its relation to, and probable effect upon, the services of existing motor carriers, railroads, and waterways. The large majority of the states, mostly by recent statutes, have provided that consideration shall be given to the probable effect that a proposed common-carrier service will have upon the business of existing transportation agencies; and a minority of the states have already put contract motor carriers into the same category as common carriers, when considering the relation of their services to other motor carriers and to non-motor carriers. The policies of the states vary as to the kind and degree of consideration that shall be given other carriers by regulatory authorities in deciding whether a motor carrier's application for a certificate or permit shall be approved. Minnesota has the distinction of having prohibited, by its Truck Act of July 1, 1933, railroads from operating trucks for hire within the state or from owning, leasing, controlling, or having any interest whatsoever in any common carrier by truck, provided, however, that authority may be given a railroad company to operate trucks within the limits of municipalities served by the railroad. On the contrary, the Federal Motor Carrier Act of 1935 and the laws and administrative authorities of many states permit railroads to engage in motor transportation, either directly or through subsidiaries; and the

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railroads in increasing number are engaging, usually through subsidiary companies, in the operation of bus and truck-line services and in the performance of collection and delivery services in their terminals. In general, it may be said that the policy of most states in passing upon an application of a motor carrier for a certificate or permit is to try to avoid both unnecessary duplication of motor-carrier services and also to consider whether an additional service that may be proposed will unduly injure existing non-motor common carriers. If this policy is generally adhered to by the Federal and state governments, and if the railroads are permitted and encouraged to develop supplementary bus and truck-line and terminal services—subject as regards their motor transportation services to the same regulation as are the services of non-railroad motor carriers—the result will be the adequate development of motor transportation, the maintenance of beneficial, and the avoidance of destructive, competition, and the accomplishment of that coördination of transportation agencies and facilities necessary to the creation of a well-organized national transportation system.

7. The filing of rates for services or schedules of charges is required of an applicant seeking a certificate authorizing service as a common carrier, and in some states contract carriers applying for a permit must file copies of the contracts stating what they are to charge. The admission of an additional carrier to a route over which a common carrier is operating may, if additional services are not needed and if the existing rates and charges are reasonable, endanger the continuance in business of the common carrier who is rendering a valuable public service.

8. In addition to the foregoing major factors that are considered in deciding upon the issuance or denial of certificates and permits to motor carriers, the statutes of the states contain some or all of several miscellaneous provisions. As stated in the report on *Regulation of Transportation Agencies*, above referred to (pp. 181–182) :

These relate to such matters as the payment of fees or taxes; the filing of bonds or insurance (required by all states of common carriers and by most states of contract carriers) ; the approval of equipment by the vehicle commissioner or other official; the personal fitness of the

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applicant to conduct the proposed operation as indicated by age, citizenship, court records, etc.; the appointment by a non-resident applicant of a statutory agent for the service of process; operation under "trade names"; the filing of local or municipal consents; and the granting or denial of applications without a hearing under certain conditions.

It is the government control over the services and the fares, rates, and charges that constitutes the core of the problem of public regulation of motor and other carriers. The task of regulating motor carriers having been undertaken by the states after they had all assumed jurisdiction over the charges of railroads, it is but natural that the fares and rates of all intrastate common carriers by motor should be regulated. In 30 of the states this was done by applying the common carrier and public utility laws to motor common carriers. In the other states the regulation of the charges of common carriers has been provided for in the motor-carrier statutes. The policies followed by the states in regulating the charges of motor common carriers vary widely, depending upon whether such charges are or are not fixed with reference to the rates and fares of "other common carriers" or "other transportation agencies," and upon whether the aim is to avoid, or to leave unrestrained, the competition of motor carriers and the railroads. An even wider range of regulatory policy prevails regarding the authority exercised by the states over the charges of contract motor carriers. As has been stated, a few states apply a like measure of rate regulation to common and contract carriers, while some states have not yet begun to fix or otherwise regulate the charges of contract carriers. In one state the commission may fix only the maximum charges, while in several states the commission may prescribe only minimum charges.

It is probable, and it is to be hoped, that the future policy of the states will be to harmonize their regulation of the charges of motor-contract carriers with that provided by the Motor Carrier Act of 1935 for the Federal regulation of such charges. The Federal law requires every interstate motor contract carrier to publish, keep open for public inspection, and file with the Interstate Commerce Commission "schedules or, in the discretion of the Commission copies of contracts containing the minimum



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charges for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such charges and the value of the service thereunder.” The charges thus filed must be adhered to, and, unless special permission is given by the Commission, they may be changed only upon 30 days’ notice. The statute also provides that if the Commission, “after hearing upon complaint or its own initiative finds that any charge of any contract carrier by motor vehicle” engaged in interstate or foreign commerce is violative of the policy of Congress as declared in the Act that the charges shall be adequate and reasonable, shall be without unjust discriminations and “destructive competitive practices,” and shall be such as will “improve the relations between, and coördinate transportation by, and regulation of, motor carriers and other carriers,” the Commission may prescribe a minimum charge; and the charge thus prescribed shall give no advantage or preference to the contract carrier in competition with a common carrier by motor vehicle subject to the Commission. Moreover, the Interstate Commerce Commission is given the power to suspend a proposed reduction in the charges of a contract carrier, action by the Commission being taken either upon complaint of interested parties or upon its own initiative. The suspension may be for 90 days; and, if the Commission has not completed its hearing and reached a decision within that time, the suspension may be extended for a period not to exceed 180 days. These provisions of the Federal statute give the Interstate Commerce Commission power so to regulate the charges of motor contract carriers as to bring about an equitable adjustment between the charges of common and contract carriers by motor. The Commission may also adjust the relation of the charges of such motor carriers to the rates and fares of other transportation agencies. If the states adopt a similar policy as to the regulation of the charges of intrastate motor carriers, they will remove one of the present obstacles to the development of a coördinated system of transportation comprising the several classes of carriers.

To make effective the regulation of carriers, whether by motor, rail, water, or air, it is necessary for the regulatory authorities to prescribe the kind and form of records that the carriers shall

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keep and the kind and scope of the annual and other reports that shall be made. An essential prerequisite of satisfactory carrier records and reports is the promulgation and enforcement by the governmental authority of a uniform system and classification of accounts for the carriers regulated. As would be expected, the states have provided for the regulation of the accounts, records, and reports of common carriers; and, with few exceptions, the states that regulate contract carriers have taken similar action regarding such carriers.

In setting forth the general scope of the regulation of motor carriers by the states, and in passing judgment upon the adequacy of the same, one may not be unmindful of the fact that the actual regulation exercised by the states is determined not only by the statutes that are enacted and by the rules that commissions may prescribe, but also by the extent and efficiency of administrative action in enforcing statutory provisions and regulatory orders. There are manifest difficulties involved in regulating motor carriers. Their number is large, supervision of their activities can be only partial, and, what is of especial significance, there has, at least until recently, been a rather general apathy on the part of the public, in some of the states, concerning the regulation of motor carriers, especially contract and private carriers. This explains why some state Commissions have not been zealous in the enforcement of statutes and orders. The majority of the regulatory authorities of the states have been conscientious and on the whole successful in performing their administrative tasks; and the general public is apparently coming to realize that the effective regulation of motor carriers may be beneficial to those regulated and to those they serve. As the motor transportation business has become better organized, the large-scale operators and their organizations have become not only tolerant of, but favorable to, government regulation, both by the states and the United States. The campaign of education that resulted in the enactment of the Federal Act of 1935 has strengthened public opinion in favor of state regulation; and, if the Interstate Commerce Commission is successful in the administration of that law, the states may be expected both to increase the scope of statutory regulation and to strengthen the efficiency of admin-

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istration. We shall see the states coöperating increasingly with the Federal Government in the joint performance of a task of common interest.

### POWER OF THE STATES TO REGULATE INTRASTATE AND INTERSTATE MOTOR TRANSPORTATION AND CARRIERS

The states by virtue of the police powers which they possess because of their sovereign powers of government may regulate the use of their highways to promote the safety and convenience of highway travel and traffic, to prevent the misuse of, and consequent damage to, the highways, and to prevent the undue congestion of highways by prohibiting their use by traffic for which there are other equally efficient and economical facilities. As has been pointed out, safety regulation applies to the kind of vehicles that may be used and to their equipment, to the size and weight of vehicles and their loads, to the speed at which they may be operated, to the qualifications required of their drivers and to the permissible consecutive hours of service and the requisite rest-hours of drivers. The states and the municipalities may adopt and enforce reasonable traffic rules and regulations. In general, the states may determine the conditions under which, and the purposes for which, their highways may be used.

While the states may not prevent or unduly obstruct or burden interstate commerce, they may apply to interstate carriers the same reasonable regulations as to the use of highways that are applied to intrastate carriers. In 1915 the Supreme Court held<sup>6</sup> that "in the absence of national legislation covering the subject a state may rightly prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others." Moreover, such regulation of the vehicles employed in interstate commerce may be applied to those owned and operated by non-residents as well as residents of the state. This question was ruled upon by the Supreme Court in 1916 when it held in *Kane v. New Jersey* (242 U.S. 160) that, "The power of a state to regulate the use of motor vehicles on

<sup>6</sup> *Hendrick v. State of Maryland* (235 U.S. 610).

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its highways extends to non-residents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety." Again in 1927, in deciding the case of *Hess v. Pawloski* (274 U.S. 352), the Supreme Court declared, "In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."

The regulation by the states of interstate highway carriers, as regards the vehicles used and their operation, has been exercised "in the absence of federal regulation" of such carriers. By the Motor Carrier Act of 1935, the Interstate Commerce Commission is given authority to establish reasonable requirements to be observed by interstate common, contract, and private carriers by motor vehicle as regards "qualification and maximum hours of service of employees, and safety of operation and equipment." When and as such requirements are established by Federal authority, the regulations by the states as to the use of their highways will need to be such as will not limit the plenary power of the Federal Government to regulate interstate commerce. The states will still have the power to prescribe reasonable safety rules to be observed by all users of the highways, so long as the rules do not limit the power of the Federal Government to regulate interstate motor transportation, and do not prevent, obstruct, or unduly burden interstate commerce. The authority of the states over intrastate carriers extends not only to the exercise of their "police powers," but to their sovereign power to regulate the performance of services vested with a public interest. Common and contract carriers upon the highways render public utility services subject to the full measure of government regulation.

The authority of a state not only to regulate the use of its highways by an interstate carrier but also to require such carrier to pay a state tax was clearly stated in the case of *Clark v. Poor* decided by the United States Supreme Court in 1927 (274 U.S. 554). The State of Ohio by its motor transportation act required a motor carrier desiring to operate in the state to obtain from the Public Utilities Commission a certificate of public con-

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venience and necessity and "to pay at the time of the issuance of the certificate and annually thereafter to pay a tax graduated according to the number and capacity of the vehicles used." A common carrier operating a motor-truck line between Aurora, Indiana, and Cincinnati, Ohio, ignored the Ohio state law, claiming that as a carrier engaged solely in interstate commerce it was not subject to regulation by Ohio. The position taken by the state authorities was in effect that, while the state could not refuse a certificate to an interstate carrier, it could require the carrier to obtain such certificate and thus be subject to the reasonable obligations thereby imposed, including the payment of the taxes required by statute in addition to the license fees payable by all vehicles. The decision of the Supreme Court was as follows:

The plaintiffs claim that as applied to them, the act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax on them, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to the regulation by the state to insure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for their use.

While a state may subject interstate motor carriers to such reasonable regulations as do not violate their property and other rights under the Federal Constitution, the state may not prohibit such carriers from using its highways in interstate commerce. This question was settled by the Supreme Court in 1925 in deciding the case of *Buck v. Kuykendall* (267 U.S. 307). As has been stated in Chapter VI, Buck, a citizen of the State of Washington, desiring to operate a motor stage line between Seattle and Portland, applied to the appropriate authorities of Washington and Oregon for certificates of public convenience and necessity.

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A certificate was granted by Oregon but was refused by Washington. The laws of the latter state prohibited the granting of an additional certificate for any territory that in the judgment of the director of public works was being adequately served by those holding certificates. The Court did not question the power of the State of Washington to enforce regulations "adopted primarily to promote safety upon the highways and conservation in their use . . . where the indirect burden imposed upon the interstate commerce is not unreasonable," but the Court held that:

The provision of the Washington Statute [by which a certificate was denied an interstate carrier] is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

At the same time the Supreme Court, as has been explained, overruled the action of the Public Service Commission of Maryland which had refused a permit to a company desiring to use the state's highways for an exclusively interstate business.<sup>7</sup> Acting under authority of statute the Commission had denied the applicant company a permit after considering whether existing lines of transportation would be benefited or prejudiced. The Court held that the Maryland "statute as construed and applied" by the Commission had "invaded a field reserved by the Commerce Clause for federal regulation."

Although no question could be raised as to the power of the states to regulate motor common carriers engaged in intrastate business, there was for some time uncertainty as to the authority of the states to regulate contract carriers. They claimed to have the status of private carriers performing services under private contracts with such individuals as they might serve. As has already been stated, motor contract carriers are now, or may be, subject to nearly the same measure of regulation as are common carriers; but this authority has been established by the process of trial and error by statutory endeavor, and by a series of decisions of the United States Supreme Court.

<sup>7</sup> *Bush v. Maloy and the Public Service Commission of Maryland*, 267 U.S. 317, decided March 2, 1925.

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What was doubtless thought to be a simple and effective plan of regulating contract carriers was tried by Michigan in 1923 in the statute to which reference has been made in Chapter VI. The law declared that "any and all persons . . . engaged . . . in the transportation of persons or property for hire by motor vehicle, upon or over the highways of this state . . . shall be common carriers, and, so far as practicable, all laws of this state now in force or hereafter enacted, regulating . . . other common carriers . . . shall apply with equal force and effect to such common carriers." A man by the name of Duke, owner of the Duke Cartage Company, had contracts with three manufacturers in Detroit, Michigan, to transport automobile bodies to manufacturers in Toledo, Ohio. Duke appealed to the United States Circuit Court for an injunction against the enforcement of the provision of the statute that would make his company a common carrier. The injunction was granted, and upon appeal to the Supreme Court the decree of the lower court was affirmed.<sup>8</sup>

The Court stated that if Duke were required to use his trucks and other equipment as a common carrier he would be prevented from using them exclusively for the performance of his contract. Moreover, his expenses would be increased by his being obliged, as a common carrier, to furnish an indemnity bond for the protection of those he served. As Duke was engaged solely in interstate transportation, the enforcement of the statute by which he would have been compelled, without compensation, to assume the additional obligations and expenses of a common carrier would have caused the State of Michigan "to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the exercise of its powers." However, the ruling of the Court as to the unconstitutionality of the statutory requirement in question would have been the same had Duke's contracts been for intrastate transportation.

The decision of the Supreme Court in the Duke Case, that a contract carrier could not be converted into a common carrier by the legislative fiat of a state, was soon followed by its decision

<sup>8</sup> Michigan Public Utilities Commission v. Duke, 266 U.S. 570, decided January 12, 1925.

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in the Frost Case.<sup>9</sup> A California statute adopted in 1917, as has been explained, provided for the comprehensive regulation of motor common carriers, and in 1919 that law was so amended as to give the State Commission regulatory control of contract carriers, the term "transportation company" being enlarged to include contract as well as common carriers. Contract carriers were prohibited from engaging in business without having secured from the Commission a certificate of public convenience and necessity. The act was sustained by the California Supreme Court, but the United States Supreme Court held the 1919 statute to be unconstitutional, its opinion being that:

The case presented is not that of a private carrier [the Frost and Frost Trucking Company] who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission.

The Supreme Court held that the statute under consideration raised the question as to the power of the state "to compel a private carrier to assume against his will the duties and burdens of a common carrier." It will be noted, however, that the California statute did not provide that all carriers for hire should have the legal status of common carriers, but that the regulations and conditions as to the use of the highways that had been applied to common carriers should be applied to contract carriers. The Federal Court was divided, there being three dissenting justices who were of the opinion that the decree of the State Supreme Court should have been affirmed. One of the dissenting justices, in a short opinion, stated that if "the legislature [of California] had said that no intrastate carriers for hire, except public ones, shall be permitted to operate over the state roads, it would have violated no Federal law," and he made the further statement that, "The states are now struggling with new and enormously difficult problems incident to the growth of automobile traffic,

<sup>9</sup> Frost v. Railroad Commission of the State of California, 271 U.S. 583, decided June 7, 1926.



and we should carefully refrain from interference unless and until there is some real, direct and material infraction of the rights guaranteed by the Federal Constitution.”

Subsequent decisions of the Supreme Court show that the thought expressed in the dissenting justice's statement just quoted came to be expressive of the viewpoint of the Court as a whole. By the Motor Vehicle Act of 1931, referred to in Chapter VI, the State of Texas limited rather rigidly the length and width of vehicles and made 7,000 pounds the weight of the load that might be carried by truck or truck and trailer on the highways, exception being made as to “implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways.” While this requirement of the law limited the use that might be made of the public roads, by common and contract carriers, it was another provision of the law to which especial objection was raised by the truckers, the provision being that, “The limitations imposed by this act as to the length of vehicle or combination of vehicles and weight of loads and of height of vehicle with load shall not apply to vehicles when used only to transport property from point of origin, to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination.” In the case of such local hauls to and from a common carrier “equipped to transport such load,” that is, a railroad, the length of the motor vehicles might be 55, instead of 35 feet and the weight of load might be 14,000, instead of 7,000, pounds. The purpose of this provision of the law was to cause the railroads to be used more and the highways less for the long-distance transportation of heavy traffic, and thus to reduce congestion upon the highways and lessen the costs of keeping them in repair. The validity of the law was contested by action of interested parties, but its constitutionality was upheld by the United States District Court, and, upon appeal, by the Supreme Court<sup>10</sup> which held that:

<sup>10</sup> *Sproles v. Binford*, 286 U.S. 397, decided May 23, 1932. The quotation is from p. 394 of the decision.

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It cannot be said that the state is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the state the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain.

Some of the provisions of the motor carrier legislation of Texas applied alike to common and contract carriers, and such were the requirements that were held constitutional by the Supreme Court in deciding the case of *Sproles v. Binford*. Shortly after that decision was rendered the Court was required to pass upon the validity of the provisions of the law applying only to contract carriers. The Texas law required a contract motor carrier, before engaging in business, to obtain from the Railroad Commission a permit which, after a hearing, shall be granted only if the Commission is of the opinion that the proposed operations of the contract carrier will not "impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory." The statute, also, gave the Commission power to regulate the operations of contract carriers in competition with common carriers upon the highways and to prescribe for contract carriers minimum rates "which shall not be less than the rates prescribed for the common carriers for substantially the same service." Common carriers were not to be granted permits that would enable them to operate both as contract and common carriers. Both contract and common carriers are required to file bonds and insurance policies to cover judgments against the carrier for loss or damages due to personal injuries or for "loss of, or injury to, property occurring during the term of said bonds or policies and arising out of the actual operation of such motor carrier."

Certain contract carriers subject to the provisions of the Texas statute brought suit in the United States district court for a decree against the enforcement of the law, alleging that the effect of the statute was to convert private contract carriers into common carriers, that their business as contract carriers was not

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vested with a public interest, and that the statute deprived them of the equal protection of the laws, in that obligations were placed upon them as private contract carriers that were not imposed upon other private carriers who used the highways for the transportation of their own commodities. The order sought by the appellants was denied by the district court whose decree, upon appeal, was affirmed by the Supreme Court in a very clear-cut and definite decision.<sup>11</sup> The major findings of the Court were that:

It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. . . .

That the statute considered as a whole does not "attempt to convert private contract carriers by motor into common carriers . . . common carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions."

The unregulated use of the highways by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by the railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power.

In further support of this the Court quoted what it had said in deciding the *Sproles Case* that "we perceive no constitutional ground for denying to the state the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained."

In support of the much disputed power of the state to prescribe the minimum rates that may be charged by contract carriers, the Court stated that this "undoubtedly interferes with the freedom of the parties to the contract, but it is not such an

<sup>11</sup> *Stephenson, et al., v. Binford, et al.*, 287 U.S. 251, decided Dec. 5, 1932.

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interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants."

The Court, in concluding its opinion, held that the Texas statute did not deny contract carriers the equal protection of the laws by applying to them provisions that were not applied to those transporting their own commodities. "It is obvious," said the Court, "that certain provisions of the statute, like that requiring the Commission to fix minimum rates, can have no application to such owners . . . all provisions relating to contract carriers which are germane to shipper-owners are made applicable to them."

The main points decided by the Supreme Court in the *Stephenson v. Binford* Case have been set forth in the foregoing quotations, because this decision of the Court fully established the authority of the states to regulate not only the equipment that contract carriers may use and how it may be operated, but also the services they may engage in and the minimum rates they may charge. This decision of the Supreme Court was followed by the enactment by many states of laws regulating the services and rates—in some cases not only the minimum but also the maximum or the absolute rates—of contract carriers; and, now that the Federal Government, by its Motor Carrier Act of 1935, has given the Interstate Commerce Commission comprehensive regulatory authority over interstate motor contract carriers, including the power, "upon complaint or its own initiative," to "prescribe such minimum charge . . . as may be necessary or desirable in the public interest," similar action may reasonably be expected by those states that have not yet provided for the regulation of motor contract carriers.

In addition to the common and contract motor carriers, whose regulation by the states has been considered in the foregoing discussion, there are the private carriers who use their vehicles to transport their own commodities. The number of private carriers and the extent to which they use the public highways in connec-

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tion with their business activities is large and is increasing. They cannot be ignored by the states in legislating to protect the highways against misuse, to promote safety, to prevent or ameliorate congestion of traffic upon the roads, and "to foster a fair distribution of traffic among the highways, railroads and waterways." As was stated in discussing the scope of regulation only a few states have as yet taken action, and thus far "the special regulation of private carriers [by the States] is chiefly confined to the matter of registration fees, permits, or licenses, equipment, safety of operation, insurance and taxation."<sup>12</sup> The decisions of the Supreme Court upholding the Texas statute give the states requisite authority for the appropriate regulation of the operations of private carriers; and it may be expected that such states as have not legislated will extend the scope of their regulation of the use of the public highways by private carriers as the need for action becomes manifest.

Upon one important subject, as has been pointed out, most of the states have taken action that applies to private carriers as well as those that operate for hire. All but a few of the states have fixed the permissible hours of service of drivers of buses and trucks. Some of the state laws include drivers for private as well as for common and contract carriers, some state laws apply their hours of service provisions only to common and contract carriers, while other laws apply in general terms to motor carriers or motor vehicle operators. Some states have not yet enacted any hours-of-service laws for motor carriers; but, as has been stated, the fact that the Federal Government has given the Interstate Commerce Commission power "to establish for private carriers of property by motor vehicle, if need therefore is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees" of interstate carriers, will presumably cause the states to act. What the states do in this regard will depend upon the success achieved by the Interstate Commerce Commission in enforcing the Federal law.

<sup>12</sup> Regulation of Transportation Agencies, Senate Document No. 152, 73rd Congress, 2nd Session, p. 174. (1934)

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## PRINCIPLES THAT SHOULD CONTROL IN THE REGULATION OF MOTOR CARRIERS BY THE STATES

That the states have adequate power for the effective regulation not only of motor common carriers, but also of the other classes of carriers upon the highways, has been definitely established by the decisions of the United States Supreme Court, especially by those validating the Texas statute of 1931. The task with which the states are now concerned is the correct and efficient exercise of the power they possess. The regulation of motor carriers, particularly those that are not common carriers, involves numerous difficult legislative and administrative problems which the states are now seeking to solve. The solution of the problems must be arrived at by experimentation, by the process of trial and error, and time will be required to achieve complete success. As a result of nearly six decades of experience with the regulation of railroads, and with the collaboration of the Federal Government during five of the six decades, the states have brought about an adequate control of railroads helpful both to the public and the carriers. The same may be said of the general results of the 40 years of state regulation of electric railways. With the more complicated undertaking of regulating the host of carriers for hire and private carriers that are using the public highways, the states have had less than two decades for experimentation, indeed, as regards contract and private carriers, regulation has been exercised for only a few years.

In all government regulation of transportation and carriers, the importance of adherence to sound principles is manifest. For that reason, Part I of this volume contains a chapter upon the objectives of government regulation of transportation and another chapter upon the principles that should control in the regulation of all agencies of transportation. In setting forth the principles that should be controlling, it was stated that government regulation of transportation should be constructive and impartial; that legislation should define the general scope of regulation and specify the matters to be regulated, leaving to an administrative commission the enforcement of the law; that administrative discretion in the enforcement of the provisions of

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the law is essential to the application of sound principles of regulation; that government regulation should stimulate, not discourage, private initiative; and that the regulation of railroads, and the same would be true of other agencies of transportation, by partial nationalization is unwise.

In dealing with the problems of government regulation that are peculiar to highway transportation and carriers, there are certain general principles that should control the action of the states. As regards what are commonly designated street- and highway-traffic regulations, authority must be exercised not only by the states but also by the municipalities which have police jurisdiction over their streets, and by the towns and counties which have some authority over rural highways. It is important that the states by appropriate provisions in municipal charters and by legislation should clearly define the scope of regulatory authority over street and highway traffic that may be exercised by local political units and by the state officials. As the streets and highways are being increasingly used for intercity and interstate traffic and travel, the tendency is to increase the scope of state authority over roads and streets. This is of advantage to the public, and presumably the trend toward increasing unity of regulations affecting the use of highways will continue.

There has come to be general acceptance of the principle that motor common carriers should be regulated as are other common carriers. In carrying out this general principle, there will necessarily be legislative provisions applicable to motor carriers that would not apply to carriers by rail or water; but, as regards the general scope and objectives of regulation, motor common carriers are in the same category as are other common carriers.

All three classes of motor carriers, common, contract, and private, should be regulated by the states, and the scope and kind of regulation should be such as will accomplish the following essential purposes, so far as it is possible to do so by wise legislation and efficient administration:

1. The promotion of the safety and convenience of the public in the use of the streets and highways.
2. The protection of the highways against improper or destructive use.

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3. The prevention of the use of the highways by a larger number of carriers for hire than is needed to serve the public adequately and efficiently.

4. The prevention of excessive and destructive competition of motor common carriers with each other, with other common carriers, and with contract carriers; and, likewise, the prevention of the destructive competition of motor contract carriers with each other and with common carriers by highways, railroads and waterways.

5. The fostering of the fair distribution of traffic among the several available transportation agencies, in order thereby (a) to prevent the unnecessary burdening of the highways to the consequent disadvantage of the public, and (b) to enable carriers by railroads and waterways to develop the services and facilities upon which the public is dependent.

6. To establish, by applying like principles of regulation to all classes of carriers, conditions that will make possible the desirable coördination of all transportation agencies and facilities.

The importance of accomplishing the last purpose in the foregoing list merits special emphasis. Government regulation of the several agencies of transportation is a prerequisite of their effective and satisfactory coördination. But government regulation should not only make possible, it should actively further, the coördination of transportation agencies, of carriers by rail, road, water, and air. The advantages of free and unlimited competition of these several classes of carriers with each other have been unduly emphasized in the past. Unregulated competition among carriers may be, has been, and, in large measure, now is, destructive, rather than beneficial. Both the public and the carriers concerned have suffered. Regulated competition of highway carriers with each other, of railroads with each other, and among carriers by water is desirable; and so also is the competition among rail, road, and water carriers. Moreover, the coördination of the several agencies of transportation is not incompatible with the continuance of competition among those that render services. The aim of government regulation should be to assure to the public and the carriers concerned the benefits of regulated intercarrier competition and the advantages that will result from such co-



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ordination of agencies and facilities as will create a unified national transportation system.

### GENERAL CONCLUSIONS

The regulation of highway transportation and carriers is in the process of an evolution that is being accelerated as the need for such regulation is more definitely understood by the public and as the power of the states to regulate the several classes of motor carriers has been more clearly established by decisions of the Federal courts.

The regulation of motor carriers by the states is broadening in scope. Contract and private carriers, as well as common carriers, are being regulated by an increasing number of states, as the aim or purpose of the states becomes more definitely the regulation of the use of the highways as well as the regulation of the users. The states are not only deciding what vehicles may be used and how they may be operated, but are deciding for what purposes and to what extent the public highways may be used. This requires the regulation of all classes of carriers, contract and private, as well as common.

The highways are being increasingly regulated as one of several transportation facilities in the development and use of which the public has an equal interest. The highway is being less and less thought of as a facility to be provided, maintained, and developed by the public to be used by unrestrained competitors of carriers operating other transportation facilities. Highways are being increasingly regarded as a component part of a general system including all the transportation facilities by which the public is, and must be, served.

The comprehensive regulation, by the application of like principles, of all of the several agencies of transportation is a requisite prelude to their possible coördination and to the consequent development of an effectively coördinated, country-wide system of transportation, each part of which will be utilized to perform the services it can most efficiently and economically render.

The regulation of highway transportation and carriers by the

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states as a whole is as yet not only incomplete, but is also lacking in uniformity. Greater uniformity in regulation by the states would lessen the burdens and handicaps that such regulation now places upon interstate motor carriers; while there could also be greater efficiency in the administration and enforcement of statutory requirements. The provisions of the Federal Motor Carrier Act of 1935 and the administration of the statute by the Interstate Commerce Commission will doubtless have much influence upon state action. The tendency will be for the states to bring their motor acts into harmony with the Federal statute. If this is done, the motor regulatory laws of many states will be made more comprehensive, there will be less dissimilarity in the statutes of the states, and there will be greater harmony between those statutes and the Federal Motor Carrier Act.

The adequate and effective regulation of highway transportation and carriers is a task in the performance of which both state and Federal authorities must participate and coöperate. There must be coöperation of the state authorities with each other, and between them and the Interstate Commerce Commission. The motor carriers and services being regulated by each state are interstate and intrastate. The necessity for interstate comity is obvious. Moreover, it is manifest that adjoining states will have problems of administration that can be best solved by joint action of two or more states. More adequate provision for such joint action might well be made by the states.

Provision has been made, by the Federal Motor Carrier Act of 1935, for the formation of "joint boards" composed of one representative from each of three states, or of more than three states, if the problems to be considered concern a larger number; and the Interstate Commerce Commission may refer complaints to the joint boards for hearings. The statute provides that, "In acting upon matters so referred joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are . . . vested in members or examiners of the Commission while acting under its orders in the administration" of the statute. Should the joint boards thus provided for prove to be helpful to the Interstate Commerce Commission, the boards may not only be the means by which the states coöperate with the Federal Gov-

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ernment, but may also be the agencies by which the states deal with the motor regulatory problems in which they have a common interest. Collaboration of the states with each other is of hardly less importance than the coöperation of the states with the Federal Government.

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## CHAPTER XXII

### FEDERAL REGULATION OF INTERSTATE HIGHWAY TRANSPORTATION AND CARRIERS

THE regulation of interstate highway transportation and carriers was provided for by the enactment by Congress of the Motor Carrier Act, that was approved by the President August 9, 1935. Reference to some of the provisions of that act has been made in the previous chapter in discussing the regulation of motor carriers by the states; and attention was called to the influence which the Federal statute is having in accelerating and enlarging state legislation and in furthering the development of greater unity in the legislation and administrative practice of the states. The Federal regulation of interstate motor carriers was important not only because it brought under government control a field of business in which public regulation was needed, and can be helpful both to those who serve and to those who are served; it was also of importance because it provided the complement necessary for the satisfactory regulation of motor carriers by the states. Highway transportation, like that upon the railroads, is both intrastate and interstate; and there are not only intrastate and interstate motor carriers, but there are many carriers upon the highways whose services are both interstate and intrastate. The entire field of regulation can be occupied neither by the states nor by the Federal Government, both need to exercise authority, and when they do, they can not only make regulation comprehensive, but they can, by coöperation with each other, accomplish the task of regulation more effectively and with more beneficial results.

#### ORIGIN OF FEDERAL REGULATION OF MOTOR CARRIERS

The Interstate Commerce Act, enacted by Congress in 1887, followed by more than a decade and a half initial action by the

states regulating railroad transportation and carriers. During that period, bills were before Congress, hearings were held, a comprehensive investigation and report was made by the Windom Committee of the Senate, the United States Supreme Court defined the scope and limitation of the regulatory jurisdiction of the states over the railroads, the services of the railroads became increasingly interstate, and finally in response to the demand of enlightened public opinion, the Act of 1887 became a law. The events antecedent to the adoption of the Motor Carrier Act of 1935 ran much the same general course, except that the investigating was done by the Interstate Commerce Commission, the report upon the Commission's first investigation being submitted to Congress in 1928 and that upon its second detailed survey in 1932.

The movement that finally resulted in Federal regulation of interstate motor carriers had its beginning in 1925 following the decisions rendered by the United States Supreme Court in March of that year in the *Bush* and *Kuykendall* cases referred to in the preceding chapter of this volume. As in 1886 the Court held that the states could not regulate the rates of railroads for interstate hauls and thus made apparent the necessity of Federal regulation of railroads, so in 1925 the Court held that the states could not prevent motor carriers from engaging in interstate commerce and must limit their regulation of interstate motor carriers to reasonable requirements as to safety of operation and as to the conservation and use of the highways, thus making manifest that Federal action was required to bring about the regulation of interstate carriers by motor.

Federal regulation of motor carriers came about quite as definitely as a result of a public realization of the need therefor as did the regulation of railroads by the United States; while the need was made evident both by the limited jurisdiction of the states over the operations of interstate carriers and by the intensity and destructive character of the competition of unregulated motor carriers with each other and with other carriers, particularly the railroads. The intensity and ill consequences of the competition were the inevitable result of the very rapid increase in motor transportation facilities and in the number of motor

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carriers at a time when a prolonged business depression greatly reduced the total tonnage of traffic available for all classes of carriers. The struggle among rival carriers became one for existence under adverse business conditions.

The bill that was introduced into the Senate in 1925 proposed the regulation of both freight and passenger interstate carriers, but the measure was not pushed and no action was taken. In the following two Congresses, two bills bearing the name of Congressman Parker received much attention, and testimony concerning them was taken in committee hearings. These two bills (H.R. 12380, 70th Congress, and H.R. 7954, 71st Congress) provided only for the regulation of interstate carriers of persons, and this was also true of another bill introduced during the third session of the 71st Congress (H.R. 10288). The sentiment in favor of regulating interstate carriers of freight developed slowly, probably because of the very large number of individuals and small concerns operating as carriers for hire, and because a large share of those carrying freight upon the highways were individuals and companies transporting their own products or merchandise. However, during the first session of the 72nd Congress,<sup>1</sup> Senator Couzens introduced a bill (S. 2793) relating to both freight and passenger carriers. The bill that was before the 73rd Congress was the Rayburn Bill (H.R. 6836, 73rd Congress, 2nd Session). This bill, which would have dealt with both passenger and freight motor carriers, had a significant origin. As stated by the Coördinator of Transportation,<sup>2</sup> it "was drawn by the Committee on Legislation of the National Association of Railroad and Utilities Commissioners, and derives in turn from a bill largely worked out by that association in coöperation with a committee of the Association of Railway Executives, representing also the electric lines, and a committee appointed by the American Highway Freight Association," a trucking organization that was later merged into the American Highway Trucking Associations, Inc.

<sup>1</sup> The author finds it difficult to associate the correct dates with "Congresses." It may be helpful to state that the 69th Congress was elected for the years 1925-1927, the dates of succeeding Congresses being for the 70th, 1927-1929; the 71st, 1929-1931; the 72nd, 1931-1933; the 73rd, 1933-1935; the 74th, 1935-1937.

<sup>2</sup> *Regulation of Transportation Agencies* (March, 1934), Senate Document No. 162, 73rd Congress, 2nd Session, p. 25.

While the Rayburn Bill was before Congress the National Industrial Recovery Act became a law; and, in consequence, in February, 1934, a trucking code was adopted by the interests concerned. For a while the Trucking Associations favored the regulation of motor freight carriers by their own enforcement of the code they had adopted; and representatives of the Trucking Association appeared before the House of Representatives Committee in opposition to the Rayburn Bill; but later the organized trucking interests changed their position and supported the bill that became the Motor Carrier Act of August 9, 1935.

During 1933, two reports were published that were of much educational value and that probably influenced public opinion. One was the report, made January 30th, by the Joint Committee of Railroad and Highway Users, whose membership included six prominent railroad officials and six delegates appointed by the National Highway Users Conference. Some of the recommendations of this Committee, composed of representatives of competitive carriers by railroads and highways, have been set forth in Chapter XX of this volume. As regards the regulation of motor carriers, the committee members were agreed that common carriers should be obliged to obtain certificates, and contract carriers permits, before being allowed to engage in business, and that both classes of carriers should be required to make adequate provision for financial responsibility, to keep proper accounts and records and to file reports, and to observe such regulations as to qualifications and hours of service of drivers as the regulatory authorities might prescribe in the interest of public safety. The public regulation of the issue of the securities by common carriers was also favored; but the Committee was not in agreement as to the desirability of government regulation of the rates and charges of motor carriers for hire. The members representing the railroads favored such regulation, while the representatives of the highway users would not go further than to agree that "adequate requirements should be imposed upon common-carrier trucks in interstate commerce to insure just and reasonable rates, with provision for publication thereof and adherence thereto, and with proper provision against undue discrimination, if and when sufficient data have been collected to indicate the desirability of such regulation in the public

interest." The representatives of the highway users also placed the same qualifying limitation upon their agreement to the proposition that contract carriers should be required "to observe minimum rates fixed by regulatory authority and comply with rules and practices applying to rates and service, as may be prescribed by the same authority."

The other report, above referred to, was one made by the Chamber of Commerce of the United States in November, 1933, announcing the results of a referendum vote of its constituent members during the preceding months of September and October. The votes reported represented the views of 973 business organizations included in the Chamber's membership, the smallest organizations having one vote each while the largest had 10 votes each. Among the questions submitted to referendum vote were whether *intrastate* carriers, both common and contract, should be required to obtain permits to operate; whether such carriers "should under regulation be required to file, post and adhere to rates that are just, reasonable and non-discriminatory among shippers"; whether the states should require "all commercial users of highways to establish financial responsibility for public liability and all common carriers also for liability with respect to passengers and cargo"; and whether the states should regulate the "hours of service of operators of commercial vehicles upon the highways." In the referendum submitted to the principal business organizations of the country, the foregoing questions as to the scope of regulation by the states were followed by the question whether "there should be the same degree of regulation by Congress of *interstate* motor carriers as has been recommended to the states for intrastate carriers as to permits to operate, rates, financial responsibility and hours of service."

As would be expected the votes upon the questions concerning the regulation of motor carriers, contract as well as common, by the states were strongly in the affirmative. The largest negative vote was that upon the regulation by the states of the rates of contract carriers, but even upon that question the negative vote was only 8.4 per cent of the total. The most significant fact regarding the referendum vote, and the one that is especially related to the present discussion, was that, of the 2,017 votes cast



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upon the proposition that Congress should regulate interstate motor carriers "as to permits to operate, rates, financial responsibility and hours of service," only 155½ votes were in the negative. It is evident that by the end of 1933 the business men of the country, the shippers of freight, had become convinced that the comprehensive regulation of motor carriers, common and contract, interstate and intrastate, would be in the public interest.

The Motor Carrier Act of 1935 was drafted by the Coördinator of Transportation, Mr. Joseph B. Eastman, and collaborators connected with his staff, after the enactment by Congress of the Emergency Railroad Transportation Act of June 16, 1933, the general purpose of which was to improve "conditions surrounding transportation in all its forms and the preparation of plans therefor." The bill first drafted by the Coördinator was, as he states, "based largely on the Rayburn bill," but different therefrom "in several important respects." In making the draft, moreover, consideration was "given to amendments to the Rayburn bill proposed by the Interstate Commerce Commission, and by the state commission representatives and others who appeared at the hearings held by the House Committee on Interstate and Foreign Commerce." The information that led to the adoption of the provisions contained in the Rayburn Bill and in the much improved draft made by the Coördinator came from many sources, from conferences with the interests concerned and from previous investigations and reports by the Interstate Commerce Commission. The investigations and reports by the Commission, to which reference has already been made,<sup>3</sup> are storehouses of information concerning motor transportation and carriers at the time the reports were made. It is interesting to note that in 1928 the Commission favored the regulation of interstate common carriers of passengers over fixed routes, but was of the opinion that "while experience may show that the interstate transportation of prop-

<sup>3</sup> The bill as first drafted by the Coördinator of Transportation and his staff is printed as Appendix G, pp. 350-371 of the Coördinator's report upon Regulation of Transportation Agencies, Senate Document No. 152, 73rd Congress, 2nd Session. The bill is discussed on pp. 45-49 of the report. The report made by the Interstate Commerce Commission in 1928 upon Motor Bus and Truck Operation is contained in 140 I.C.C. 685-760, and the report made in 1932 upon Coördination of Motor Transportation is to be found in 182 I.C.C. 263-430.

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erty by motor vehicles upon the highways should be regulated, there does not appear to be at this time need therefor." However, four years later the Commission had reached the conclusion that interstate motor carriers, both passenger and freight, "should be subjected by law to reasonable public regulation" by the Interstate Commerce Commission. The fact that the Commission, in 1932, was not yet ready to recommend the regulation of the rates and charges of motor freight carriers for hire, indicates that the conviction, reached two years later, that such regulation was needed was arrived at by a conservative evolution of thought.

The legislation proposed by the Coördinator of Transportation for the regulation of interstate motor carriers was before Congress during two sessions. The first bill prepared by the Coördinator was introduced in 1934, in the 73rd Congress, 2nd Session, as Senate Bill 3171. A like bill was also introduced into the House of Representatives. Committee hearings were held for the discussion of the proposed measure, but action was not taken until the following year, when after further hearings, the 74th Congress, during the first session, adopted the Motor Carrier Act that was approved by the President August 9, 1935. During the year and more that intervened between the introduction of the first bill drafted by the Coördinator and the enactment of the Motor Carrier Act, the suggestions and criticisms that were received led to modifications and improvements in several provisions of the proposed legislation. Moreover, during the period of more than a year that the legislative proposal was before Congress after the demise of the National Industrial Recovery Act and of the codes based upon that law, increasing support was given the proposed measure. There was more general and intelligent approval on the part of the public, and the motor-truck interests, speaking through their national organization, the American Highway Trucking Associations, Inc., changed from opposition to support of regulatory legislation. The additional support thus gained was in no small measure due to the Coördinator of Transportation, whose official reports, testimony before and counsel given committees of Congress, public addresses, and, probably most of all, the conferences which he and the members of his collaborating staff had with motor carriers and their organizations were

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very successful in causing those who had been opponents to become advocates of the proposed legislation. It is most fortunate that the Motor Carrier Act was adopted with the general approval and support of those that are to be regulated, instead of being forced upon them over their opposition, because the co-operation of those regulated will make easier the successful accomplishment of the difficult task of administering the law effectively.

### THE MOTOR CARRIER ACT OF 1935

The Act of August 9, 1935, "providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, and for other purposes," made the Interstate Commerce Act as it had been amended to date, Part I of an enlarged statute, of which the Motor Carrier Act is Part II. If and when Congress legislates for the regulation of carriers by water, that law will become Part III of a yet more comprehensive interstate commerce act. It is to be hoped that the addition of Part III may not be long delayed, and that contemporaneously with or shortly after the adoption of Part III, a fourth part may be added providing for the regulation of transportation and carriers by air.

As has been customary in legislating, Congress in the section (Sec. 202) following the one stating the title of the statute starts the Motor Carrier Act with a "declaration of policy" which is in reality a statement of the ideal which Congress seeks to attain as a result of the enactment and enforcement of the statute. The phraseology of the declaration is the same as that used in the draft of the bill now pending for the regulation of carriers by water, with the substitution of "motor" for "water" to designate the carriers regulated. As that declaration was quoted in discussing the proposed regulation of carriers by water (Chapter XIX, p. 470), reference need be made here only to the clause added to the declaration in the Motor Carrier Act that it shall be a part of the policy of Congress to "coöperate with the several states and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforce-

ment'' of the statute. The Interstate Commerce Commission is vested with authority to administer and enforce the Act, provision being made in later sections of the law for the organization of joint boards composed of representatives of three or more states to assist in administering the statute.

The Act applies in varying degree to common, contract, and private motor carriers in interstate and foreign commerce, and to brokers or agents of motor carriers, and division (a) of the third section of the law is devoted to definitions of those regulated and to defining the many terms employed in the statute.<sup>4</sup> Division (b) of this section (Sec. 203) contains the long list of motor vehicles that are exempted from regulation by the statute, the exemptions including school buses; taxicabs carrying not more than six passengers and not operated over fixed routes; hotel buses; government buses in national parks; motor vehicles used by farmers and those used by an agricultural coöperative association; electric trolley buses; motor vehicles used exclusively in carrying live stock, fish, or unmanufactured agricultural products; trucks used in distributing newspapers (except as regards qualifications and hours of service of employees); buses and trucks operated within a municipality or between contiguous municipalities or within a zone adjacent to a municipality; and buses or trucks operated occasionally for hire by persons not regularly engaged in transportation by motor vehicle.

The general duties and powers of the Commission as regards the regulation of each class of carriers and of the brokers subject to the Act are set forth in Section 204. The general scope of the regulation provided for is stated in this section while later provisions of the statute set forth in detail the requirements of the law.

The following section deals with administrative procedure to

<sup>4</sup> As the Motor Carrier Act is Part II of the Interstate Commerce Act, the sections in Part II are designated Sections 201 to 227 inclusive. Thus the definitions are in Section 203. The Interstate Commerce Commission October 1, 1935, published the entire Interstate Commerce Act as amended to that date, "together with text or related sections of certain supplementary acts" and "with appropriate cross references to the United States code." The publication was printed by Government Printing Office, Washington, D.C. A good brief summary of the provisions of the Motor Carrier Act is contained in the Annual Report of the Interstate Commerce Commission for 1935, pp. 12-16.

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be followed by the Commission and by the state joint boards in the enforcement of the statute. The many questions over which the joint boards may be given jurisdiction by the Commission are enumerated and the statute provides that "in acting upon matters so referred joint boards shall be vested with the same rights, duties, powers and jurisdiction as are hereinbefore vested in members or examiners of the Commission, while acting under its orders in the administration of" the statute. The "orders recommended by the joint boards shall be filed with the Commission and shall become orders of the Commission and become effective in the same manner and shall be subject to the same procedure, as provided in the case of orders recommended by members" of the Commission or its examiners. In other words, the decisions reached by the joint boards are recommendations which the Commission may adopt and carry out without change or may regard as tentative opinions such as its examiners make, based upon investigations and hearings. There are, however, many administrative duties that the Commission can entrust to the joint boards for action in accordance with the general policies adopted by the Commission, and it is probable that the joint boards will prove to be very helpful to the Commission in handling the many details involved in enforcing the statute.

In Sections 206 to 210 are statutory provisions regarding the application for and issuance of the certificate of public convenience and necessity that a motor common carrier must obtain, and the permit that a contract carrier must secure, before engaging in business. There is the usual "grandfather" clause that provides for the issue of certificates and permits to those carriers that were in bona-fide operation June 1, 1935. The Commission is empowered to authorize "the whole or any part of the operations covered by the application" of a common or contract carrier; but after January 1, 1936, no person may be granted both a certificate as a common carrier and a permit as a contract carrier, "unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared" in the Act.

The regulation of the business of brokers that sell transportation for motor carriers is provided for by Section 211 of the Act.

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Such brokers, before engaging in business, must obtain licenses and must conduct their business in accordance with such regulations and only to such extent as the Commission deems consistent with the public interest and with the general policy of the Act.

Sections 212 and 213 of the statute deal respectively with the "suspension, change, revocation and transfer of certificates, permits and licenses" and with the "consolidation, merger and acquisition of control" of motor companies. Certificates or permits may be transferred from one holder to another subject to such rules and regulations as the Commission may prescribe, unless such transfer is made to effect a consolidation or merger, in which case the requirements of Section 213 must be observed. Mergers and consolidations of motor companies and the acquisition of the control of such companies by railroads or other non-motor companies are lawful only when approved by the Commission and when they conform to the detailed and specific requirements of the statute. In general, the Commission is given power to regulate mergers and consolidations and holding companies in the motor transportation business, similar to the authority that the Commission has over railroad companies by the Emergency Transportation Act of June 16, 1933.

The jurisdiction of the Commission, granted by Section 214, over the issue of the securities by motor common and contract carriers is limited, in that it shall not be exercised in the case of "carriers or corporations where the par value of the securities to be issued, together with the par value of the securities then outstanding, does not exceed \$500,000." This proviso will exempt from public regulation the finances of the large majority of motor common and contract carriers.

The "security for the protection of the public" is well taken care of in the rather short Section 215 which stipulates that the issuance of a certificate or a permit and its continuance in force shall be contingent upon the carrier's compliance "with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require" to cover damages to persons and property due to negli-

gence on the part of the holder of the certificate or permit. The Commission may, also, in its discretion, require motor common carriers to file surety bonds or insurance policies, or securities to cover their liability to shippers or consignees for losses to property transported by the carriers.

After carriers, whether by railroad, waterway, or highway, have been permitted to operate, the regulation of the rates and charges that they may exact for their services is of greater importance to the carriers concerned and to the public than is any other phase of regulation. With certain necessary modifications, the policy that has been developed in the Federal regulation of railroad rates and fares has been adopted for the regulation of the charges of interstate motor common carriers. Section 216 of the Motor Carrier Act provides:

1. That motor common carriers of passengers shall establish reasonable through routes with other such carriers and establish reasonable joint fares and charges and equitable divisions thereof between the participating carriers.

2. That motor common carriers of property shall establish and observe reasonable rates and classifications and "just and reasonable regulations and practices relating thereto."

3. That such common carriers of property may establish—it is not made compulsory—through routes and joint rates with other motor carriers and with carriers by water or railroad; motor carriers of passengers also may establish through routes and joint fares with rail and water carriers, the division of joint rates or joint fares to be equitable, and without undue preference, among participating carriers.

4. That it shall be unlawful for any motor common carrier to give "any undue or unreasonable preference or advantage to any particular person, port, gateway, locality or description of traffic" or to make any unjust discriminations whatsoever.

5. That "any person, state board, organization or body politic may make complaint to the Commission concerning any common carrier's fares, rates, or classifications that are in effect or that may be proposed." Moreover, if the Commission, "after hearing, upon complaint or in an investigation upon its own motion" shall find that a fare, rate, charge, or classification is unreasonable or

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unjustly discriminatory, the Commission "shall determine and prescribe the lawful rate, fare, or charge, or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed"; the Commission may also prescribe through routes and joint fares for motor common carriers of passengers. This part of the statute, however, provides, "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatsoever." <sup>5</sup>

6. That the Commission, upon complaint or upon its own motion, may determine whether the division of joint fares and rates between motor carriers, or between motor and other carriers, is just, and if a division is found to be unjust the Commission shall decide what is just and issue a corrective order. If a division of a joint fare or rate, found to be unfair or unjust, is one that was established by a previous order of the Commission, the order correcting the unjust division may be dated back to such time as the Commission finds justified.

7. That the Commission either upon complaint of an interested party or upon its own initiative may suspend, for a period of 90 days, a fare, rate, or classification proposed by a motor common carrier, and conduct a hearing to decide whether the proposed charge or classification is lawful and should go into effect. If the hearing or investigation is not concluded in 90 days, the Commission may extend the suspension for a period not to exceed 180 days in the aggregate.

8. That, in determining the reasonableness of any fare, rate, or charge, the Commission shall not take into consideration, as an element of the value of the carrier's property, "either good will, earning power, or the certificate under which such carrier is operating"; but,

<sup>5</sup> The Interstate Commerce Commission has the power to change intrastate railroad fares, rates, or charges that unduly burden, or unjustly discriminate against, interstate commerce. The intrastate railroad rates may differ from, but must not unduly discriminate against, the interstate rates fixed by Federal authority. The intrastate and interstate rates must be reasonably related to each other, each bearing its due share of the burden of supporting the railroad system as a whole.



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9. That in prescribing just and reasonable fares and rates of motor common carriers "the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers, to the effect of rates upon the movement of traffic by such carriers, to the need in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable such carriers, under honest, economical and efficient management, to provide such services"—this last provision being a copy of the rule of rate-making embodied in the Emergency Railroad Transportation Act of June 16, 1933.

Every motor common carrier is required, by Section 217 of the Motor Carrier Act, to print, file with the Commission, and "keep open to public inspection, tariffs showing all the rates, fares and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and points on the route of any other" motor, railroad, express, or water carrier, "when a through route and joint rate shall have been established." No rates, fares, or charges other than those stated in the tariffs may be exacted, no rebates through agents or otherwise may be granted, and 30 days' notice of any change in the rates, fares, or charges must be given the Commission, unless it should permit a change to be made upon shorter notice.

As would be expected, the requirements of the statute (Sec. 218) regarding the rate schedules of contract carriers are fewer than those applying to the rates and tariffs of common carriers. Every motor contract carrier is, however, required to publish, file with the Commission, and keep open to public inspection, its schedules of minimum charges, or, if the Commission so elects, "copies of contracts containing the minimum charges of such carrier for the transportation of passengers or property in interstate or foreign commerce." No reduction may be made in such charges, except upon 30 days' notice to the Commission, unless special permission is granted by the Commission. The carrier may not lawfully collect less than the published rate, fare, or charge; the statute, however, provides that the Commission may grant the

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carrier relief from this requirement "to such extent and for such time and in such manner as in its judgment is consistent with the public interest" and the general policy as stated in Section 202 of the statute. If the Commission, after a hearing upon complaint or its own motion, finds that a charge, regulation, or practice of a motor contract carrier contravenes the policy declared in Section 202 of the Act, "the Commission may prescribe such minimum charge, or such rule, regulation or practice as in its judgment may be necessary or desirable in the public interest and to promote the policy declared in said section." It is especially significant that the statute requires the Commission in fixing the rates of contract carriers to "give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle over which the Commission has jurisdiction." The other factors to be taken into consideration in fixing the rates of contract carriers are similar to those that are to be determinative in prescribing the charges of common carriers. Likewise, the Commission has the same power to suspend a schedule or contract proposed by a contract carrier, pending the determination of the reasonableness of the same, that it has as regards the rates, fares, or charges proposed by common carriers.

By Section 219, of the Act, motor common carriers engaged in interstate or foreign commerce must issue a receipt or bill of lading for property received for transportation, and be liable to the lawful holder of the receipt or bill of lading for any loss, damage, or injury to such property caused by the carrier. The liabilities, and exemption therefrom, of interstate motor common carriers are the same as those of railroads; the provisions of Section 20, paragraph (11) of the Interstate Commerce Act are to be applied "with like force and effect" to motor carriers.

The Commission is authorized by Section 220 of the Motor Carrier Act "to require annual, periodical, or special reports from all motor carriers," to "prescribe the forms of any and all accounts, records and memoranda to be kept by motor carriers" and the length of time records shall be preserved. The examiners of the Commission may at all times have access to the accounts and records of the motor carriers subject to its jurisdiction and to the equipment and other property used by the carriers in the

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performance of their services. The provisions of this section apply also to the brokers that are made subject to regulation by the Act.

The necessary administrative provisions as to the service of the Commission's orders and notices and as to the designation of persons upon whom a process issued by order or authority of a court may be served are contained in Section 221, while Section 222 fixes the penalties that may be imposed upon violators of the statute. In general, the penalty for the wilful violation of the act is not more than \$100 for the first offense and not more than \$500 for any subsequent offense, and "each day of such violation shall constitute a separate offense." For offering or accepting "any rebate, concession, or discrimination in violation of any provision" of the statute, the fine shall be "not more than \$500 for the first and not more than \$2,000 for any subsequent offense." A special agent or examiner of the Commission who divulges any information acquired in making an examination, except upon an order from the Commission or a court of competent jurisdiction, shall be subject "to a fine of not more than \$5,000 or imprisonment for a term not exceeding two years, or both." Any carrier or broker "who shall wilfully fail or refuse to make a report" or "to keep accounts, records and memoranda" as required by the Commission shall "be subject for each offense to a fine of not less than \$100 and not more than \$500."

Motor common carriers of freight are required to collect the transportation charges before relinquishing possession of the property transported (Section 223). Each vehicle operated under a certificate or permit issued by the Commission must display a suitable identification plate (Section 224); while Section 225 contains the potentially important provision authorizing the Commission "to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle." Section 226 contains the provision now found in most statutes that if any part of the law is held to be invalid the remainder of the statute shall not be effected thereby. The final section (Sec. 227) of the Act provides that the statute shall be in force October 1, 1935, the Commission

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being authorized to postpone to a date not later than April 1, 1936, "the taking effect of any provision." The Act was approved by the President August 9, 1935.

The foregoing summary of the main provisions of the Motor Carrier Act of 1935 shows that the Federal Government has made comprehensive legislative provision for the regulation of interstate motor carriers of all classes. Contract as well as common carriers are to engage in business only with the permission of the Government, and their charges are subject to such government regulation as may be required to prevent rates and fares from being unreasonable *per se* or unjustly discriminatory as among motor carriers and as between motor carriers and carriers by railroad or waterway. The operations of private carriers—the carriers that transport the major share of the traffic moved upon the highways—are to be subject, if the Commission shall find need therefor, to "reasonable requirements to promote safety of operation." The Commission may prescribe for private, as well as common and contract, carriers "qualifications and maximum hours of service of employees, and standards of equipment," and the Commission is to make such investigation as may be necessary to make a report to Congress upon the need for statutory regulation by the Federal Government "of the sizes and weight of motor vehicles and combinations of motor vehicles, and maximum hours of service of all motor carriers and private carriers of property by motor vehicle." Whether this investigation will show a need for further statutory regulation of the operations of private carriers, or whether the experience of the Commission in the administration of the Act will indicate that the discretionary power which the Commission is given by the present statute is sufficient to enable the Commission to regulate interstate private carriers adequately, can only be determined at a later date. For the present, it is sufficient and gratifying to note that the statute contemplates such exercise of government authority over the operations of private carriers as may be found necessary for the protection of the interests of motor and other carriers for hire and for safeguarding the welfare of the public.

What the actual results of the enactment of this comprehensive

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statute will be, will, of course, depend not only upon the provisions contained in the law, but upon the success attained by the Commission in the administration and enforcement of the Act. The responsibility that has been placed upon the Commission is by no means light. For reasons that are manifest, to make the statute effective and successful will be difficult; and it will be of interest to consider briefly the organization that has been established to administer the statute and the task to be performed by that organization.

### THE ORGANIZATION AND TASK OF ADMINISTRATION

After the enactment of the Motor Carrier Act by Congress, the Interstate Commerce Commission, on the first of October, 1935, changed its organization and reduced the number of its divisions from seven to five. To Division 5 were assigned matters arising under the Motor Carrier Act, while Division one was given charge of valuations. Matters, other than those upon which the Commission as a whole must act or those that are assigned by the Commission to a single commissioner, were allocated to the other three divisions. Each division is in charge of 3 commissioners, some of the 11 commissioners being connected with more than one division. As was explained in Chapter VIII, which gives an account of the agencies by which transportation is regulated, there are 14 bureaus within the Commission's organization. One of these is the Bureau of Motor Carriers which as now organized is under the jurisdiction of Division 5 of the Commission. Joseph B. Eastman was selected for Chairman. Long service on the Interstate Commerce Commission, his activities as Coördinator of Transportation, and his participation in the drafting and promotion of the bill that became the Motor Carrier Act, made him thoroughly familiar with the purpose and requirements of the statute and equipped him to act with especial intelligence and efficiency in planning and setting in motion the organization for the administration and enforcement of the law. Moreover, Mr. Eastman was fortunate in having for his executive assistant Mr. John L. Rogers, a man well qualified by experience and person-

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ality to fill the position of Director of the new Bureau of Motor Carriers. In 1937, Mr. Rogers became a member of the Commission and a member of Division 5.

It will be noted, first of all, that the Commission did not intrust the task of administering the Motor Carrier Act to an existing division of the Commission and to the several bureaus that were functioning in the administration of the Interstate Commerce Act—such as the Bureaus of Safety, Traffic, Finance, and so forth—but that a new division of the Commission and a new bureau were established and were given large responsibility. As Commissioner Eastman has stated :

At the outset we [the Commission] decided that this new job of regulation should be handled through a new Bureau of Motor Carriers, separate and distinct from the older bureaus of the Commission which have been dealing for many years with railroads. We selected for the key positions in this new bureau men with long experience in motor carrier operation or regulation or both, or who were otherwise specially qualified for the duties entrusted to them. We decided to have not only a central staff at Washington, but an extensive field organization, scattered throughout the country at strategic points and made up of district directors and supervisors with motor-carrier experience, who could maintain close contact with the operators and help them comply with the law.<sup>6</sup>

The Commission thus recognized that the problems to be dealt with in administering the Motor Carrier Act were not only different in many respects from those connected with the regulation of rail and water carriers, but were problems that so far as practicable must be met locally. The time required for building up the administrative organization was made somewhat greater because the Commission very wisely secured most of the employees and officials other than the director and the district directors through the procedure of civil service examinations. The staff at the central office in Washington, D.C., at the end of 1936, included 452 employees, while there was a field force of 201 to man the district offices and to serve as inspectors and field agents. There are 16 district officers and as many district directors, each receiving the

<sup>6</sup> From an address made Feb. 3, 1936, at Tulsa, before the Associated Motor Carriers of Oklahoma.

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modest salary of \$5,600 per annum. Men competent to fill the position of district director were not easily obtained, but were found during 1936. Provision was made for 76 district supervisors, at a salary of \$3,800 yearly; and the staff of each district office includes a joint board agent, one or more rate and tariff agents, one or more accountants, and the requisite number of stenographic and clerical assistants. Such in general was the organization initially provided for; its future development and changes will, in the nature of things, be such as administrative experience may prove to be desirable.

Moreover, it is gratifying to note that the Commission developed the organization and its activities in a conservative manner. Commissioner Eastman declared that <sup>7</sup> "because of the practical difficulties involved in regulation, it is our purpose to proceed gradually and build up from minimum requirements, instead of attempting any full-blown system of regulation at the outset. In other words we intend to feel our way along and be sure that we are on sound ground before we go ahead, keeping in mind always the small operator and the troubles he will have in adjusting himself to any elaborate requirements." Apparently this large and important part of the Interstate Commerce Commission's work, like the other phases of its activities, was kept free from contamination by partizan politics and the spoils system of appointments.

The task of administering the Motor Carrier Act necessarily began with the preparation and distribution of many new forms. In its annual report for 1935, which is dated December 1st, the Interstate Commerce Commission says, in reference to the preparation of the forms that:

In establishing rules and regulations as to safety of operation and equipment, insurance or other security for the protection of the public, tariffs, accounting classifications, periodical reports, procedure, etc., it is necessary to consider carefully the existing methods and practices, the present requirements of State and municipal authorities, and the need in the public interest of further and differing requirements. This work is now in progress.

<sup>7</sup> In an address delivered before a Transportation Conference at Detroit, Michigan, March 19, 1936.

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This preliminary work of the Commission was slowed down by the failure of Congress, due to a filibuster conducted by Senator Long of Louisiana, to appropriate funds for the administration of the Motor Carrier Act. This situation was, after some delay, remedied by an arrangement with the Comptroller of the Currency by which the Commission was permitted to allot temporarily from its regular annual appropriation a sum for the administration of the Motor Carrier Act, equal to one-half of the amount that Congress was to have appropriated for motor-carrier regulation. This enabled the Commission, October 1, 1935, but not until that date, to begin the employment of a staff to execute the new statute. This delay in getting its work started, as well as the magnitude which the task was found to have as the work proceeded, compelled the Commission to exercise the authority it had been given to postpone the effective date of several provisions of the statute.

The first large administrative task to be performed after the necessary forms calling for the requisite information had been prepared and distributed was to enforce the requirement that common carriers must obtain certificates of public convenience and necessity and that contract carriers must secure permits to continue in, or to enter upon, carrier operations. The "grandfather" clause in Sections 206 and 209 required prompt action and no little labor on the part of the Commission. The statute provided that common carriers who were in bona-fide operation on June 1, 1935, and contract carriers actually in service July 1, 1935, and who were registered under any code of fair competition, should be granted certificates or permits "without further proceedings," provided such carriers filed their applications therefor within 120 days after the date upon which Sections 206 and 209 became effective, which date was fixed by the Commission and was determined by the date upon which the Commission called for the application and accompanying data. The applications under the "grandfather" clause had to be filed with the Commission by a certain date, which date, after three postponements, became February 12, 1936. All carriers applying for certificates or permits after that date were required to prove their fitness to perform the proposed service and the public necessity



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for the service. The Commission made a zealous effort to reach all carriers entitled to the benefits of the "grandfather" clause, and thus to avoid placing upon them any avoidable burden. Blank applications calling for information were mailed to about 200,000 bus and truck owners, but the number of carriers that filed applications was less than that total. Certificates or permits could not be issued to those applying for them under the "grandfather" clause until the carriers had complied with the Commission's requirements as to the filing of insurance policies, surety bonds, self-insurance, or other like security for the protection of the public.

Hearings upon applications of carriers for certificates or permits began on February 24, 1936, when the Director of the Motor Carrier Bureau heard testimony supporting and opposing the Pan-American Bus Lines for a certificate authorizing the continuance of the operation of a bus line between New York City and Miami, Florida. The line had begun operation August 10, 1935, and thus the application did not come under the "grandfather" clause. The grant of a certificate was opposed by the Greyhound Lines, the Florida Motor Lines, and by the railroads whose lines carried passengers between New York and Florida. The Director recommended that the Commission deny the application for a certificate of public convenience and necessity, it being his opinion that the passenger transportation facilities between New York and Florida, prior to the beginning of operation by the Pan-American Bus Lines, were reasonably convenient and adequate and that "the applicant's operations were not in the public convenience and necessity." However, in the final determination of the question, the Commission allowed the applicant to continue operations. Hearings by joint boards upon applications for certificates and permits began early in March, 1936, thus bringing about the early coöperation of the states with the Federal authorities in the administration of the statute.

One unforeseen question was raised by the trucking interests concerning certificates of public convenience and necessity. Before the enactment of the Motor Carrier Act of 1935, numerous railroads, with the approval of the Commission, had begun offering shippers and consignees of less-than-carload freight a collec-

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tion and delivery service, the railroads usually contracting with local truckers for the performance of the service. By the end of 1935, the railroads generally had decided that the country-wide adoption of a collection and delivery service was necessary to check the diversion of less-than-carload freight from the railroads to the highways. The Association of American Railroads, at its annual meeting held in Chicago, November 7 and 8, 1935, took action recommending "that the installation of collection and delivery of merchandise freight on railroads locally, jointly, and between different freight territories be put in effect as soon as possible under such rate structures and to such extent as the several territories may work out." It was also recommended that the various rate organizations proceed to revise the rate structure on merchandise freight so that it will best meet competition in the territories.<sup>8</sup> When this action was taken, only the Pennsylvania Railroad and a few other companies had installed collection and delivery services, in the eastern territory, but early in 1936 the railroads in that territory decided to provide for such services generally throughout the district, and they prepared and filed with the Commission tariffs, to be effective April 1, 1936, whereby the railroads were to include in their less-than-carload freight services, regardless of the length of the railroad haul, a collection and delivery service without making any charge therefor in addition to the regular station-to-station freight rate. Those shippers and consignees who chose to do their own trucking to or from the freight stations were to be given a discount of 5 cents per 100 pounds in the freight rate.

This proposal of the railroads aroused the opposition of the local trucking interests and of their national organization, the American Trucking Associations, who felt that their business was being taken from them unfairly, and who also maintained that the railroads could not engage in the collection and delivery of freight, through contractors or ownership-controlled companies, without first obtaining from the Commission certificates of public convenience and necessity. To the surprise of the railroads, and also of the public in general, the Commission suspended the proposed less-than-carload freight tariffs, that included a collection

<sup>8</sup> *The Railway Age*, Nov. 16, 1935, Vol. 99, p. 642.

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and delivery service, just before they were to have gone into effect. The Commission was divided, but was doubtless influenced by its doubt as to the wisdom of granting a reduction, in the regular freight rate, to shippers and consignees doing their own trucking. The tariffs were suspended for a period of seven months, during which the Commission made an investigation into the whole problem of collection and delivery services and charges.

The Commission's uncertainty as to the policy it should follow as to the future development of the plans of the railroads to combine collection and delivery services with the line-haul transportation of freight was indicated by the fact that on April 15, 1936, certain eastern railroads were permitted to refile, effective 10 days later, their less-than-carload tariffs after they had been modified by omitting the provision allowing a reduction in the freight rate for shippers or consignees doing their own trucking. This again brought on vigorous opposition by the local trucking concerns, especially in New York City, and two days before the revised tariffs were to have gone into effect the Commission reversed its previous position and suspended the revised tariffs, as it had the previous ones, until November 1, 1936. The question at issue was decided by the Commission in favor of the railroads which were allowed, by order effective November 16, 1936, to collect and deliver less-than-carload freight without additional charge for the service. The free service applies to freight paying a rate of 45 cents or more per 100 pounds. Those shippers and consignees who do their own cartage receive a reduction of 5 cents per 100 pounds in the freight rate.

The essence of the public regulation of carriers, as has already been indicated, is the determination by government authority as to who may serve as carriers for hire, and the exercise of such control over the charges for services as will assure to the public rates and fares that are reasonable and not unjustly discriminatory. The making of freight rates must be preceded by the classification of commodities and the construction of tariffs. The publication, filing, and posting of rates, and the conduct of carrier operations, require the use of freight tariffs. Some of the larger motor carrier companies had classified their freight and were using class tariffs when the Motor Carrier Act became effec-

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tive; and some state commissions had required intrastate common carriers by motor to make rates according to freight classification promulgated by state authority; but not all states had so acted. Moreover, the state motor freight classifications were not uniform. Compliance with the requirements of the Motor Carrier Act as to the filing of freight rates required action by the trucking interests concerning motor freight classification.

Naturally the first question raised was whether the Interstate Commerce Commission would prescribe specific and detailed rules to be followed in the filing of tariffs and rate schedules. The Commission, that is, the Motor Carrier Bureau and Division 5 of the Commission, decided to feel their "way along with a considerable degree of care" and to issue a small pamphlet of rules to be revised and amplified as the Commission gained experience and came to "know more about motor carrier rates and charges and any peculiar characteristics which must be taken into consideration in shaping rules and regulations to govern their statement in tariff form." The Commission thus left "the carriers free to file such rates as they deem fair and reasonable." The carriers were, however, to file "rates stated in tariff form."<sup>9</sup> As the rates and charges had to be in effect not later than April 1, 1936, the Commission ordered the carriers to have their tariffs on file by March 2nd. Later the Commission allowed the tariffs to be filed up to March 31st.

As would be expected, the national organization of motor carriers, the American Trucking Associations, took up the question of developing a classification to be used in making motor freight rates. At a convention of the organization held in Chicago, in October, 1935, there was a discussion of a resolution that was recommended by its committee on rates and tariffs that truck rates be developed "on a basis of reasonable truck operating costs plus a reasonable profit, and applied under a truck classification of commodities." This resolution was not adopted by the conference, but the following month the Trucking Associations decided to have a committee prepare "a national motor freight classification of commodities, differing materially in many re-

<sup>9</sup> From Commissioner Eastman's address, above referred to, made at Tulsa, Oklahoma, Feb. 3, 1936.

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spects from railroad classifications, and designed to preserve for the shipping public all the natural advantages of truck transportation which they have at present.”<sup>10</sup>

The classification was prepared. In addition to this classification, three others were constructed and used in compiling motor tariffs—the Coördinated Motor Freight Classification, published by the Massachusetts Rate Bureau; the Official Motor Freight Classification, published by the Connecticut Rate Bureau; and the Transcontinental Motor Freight Classification. Many, but not all, motor operators made these classifications the bases of their rate tariffs. In the actual making of rates, there were conferences of groups of operators and many of the tariffs filed with the Commission were issued by tariff-publishing agencies representing groups of operators. The Truck Tariff Bureaus that were organized, while working out tariffs that were adopted and filed by the operators, whom they served, functioned coöperatively and had a national conference while they were engaged in their task of common interest.

The first motor-truck freight classifications and the original motor freight tariffs may safely be assumed to be but the beginning of a development that will continue for some time to come. The present railroad freight classifications and rates have had a long evolution; and it is apparent that the active and far-reaching competition of the motor carriers with the railroads has made it necessary for the railroads to change both their freight classifications and their rate structures. The future development of motor transportation, and of its regulation by the Government, will be accompanied by an evolution of the motor freight classification and of the rate structure or structures of motor carriers.

Reference need here be made but briefly to some of the tasks, other than the two major ones connected with the issuance of certificates of public convenience and necessity and of permits and with the control of rates, fares, and schedules of charges, that were involved in setting in motion the machinery of Federal regulation of motor carriers. One such task, and it was not a simple one, was to devise and prescribe a uniform system to be

<sup>10</sup> H. F. Lane, "I.C.C. Begins Motor Carrier Regulation," *Railway Age*, Jan. 4, 1936, Vol. 100, p. 25.

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followed by motor carriers of different classes in keeping their accounts. The system of accounts, as Commissioner Eastman said, has to be elaborate enough to take care of the needs of the large and well organized companies" but also one that can "be shrunk down to very simple forms adapted to the capacities of the little operator who cannot be expected to keep elaborate accounts." Conferences were held with interested parties, and the Bureau of Motor Carriers had the coöperation of state commissions, it being desirable to minimize the conflict of the Federal with the state accounting systems. For large carriers an accounting system, effective January 1, 1938, has been prescribed.

The task given the Commission by the statute "to establish reasonable requirements with respect to . . . safety of operation and equipment . . . and maximum hours of service of employees" will require time to perform satisfactorily. The safety of the public must be safeguarded so far as possible, and the motor transportation business must not be unnecessarily burdened. The plan of procedure adopted by the Commission has been to formulate comparatively simple safety rules and to give plenty of opportunity to carriers and the public to criticize the rules before their final promulgation. The problem of standardizing hours of service of employees of motor carriers is a complicated one. The requirements of the state statutes concerning maximum consecutive hours of service and minimum hours of rest vary widely. What is needed is common action by the states and Federal Government, first, in adopting and promulgating standard requirements, and, second, in coöperating in the especially difficult task of really enforcing such requirements. The standards adopted should apply to, and be enforced regarding, all classes of motor carriers, private as well as common and contract. Their number is large, and their operations are carried on under conditions that make very difficult the enforcement of rules concerning hours of service.

It was inevitable that many legal questions would arise that the Commission would have to consider in interpreting and applying a statute providing for the comprehensive regulation of an industry that has developed so recently and so rapidly as has that of motor transportation. Indeed, the industry is now in a state

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of rapid change. Those subject to regulation under the statute were often in doubt as to the obligations and requirements placed upon them by the new legislation. The Commission, while giving these legal questions diligent study, has been careful not to make more decisions than necessary in advance of experience, by which knowledge is gained in dealing with the problems of regulation. The final decision of legal questions rests with the courts. The Commission has followed a policy of giving those that would be affected by a decision as to a legal question full opportunity to present their views, the purpose of the Commission being so to adjust controversial matters that the rights of those affected will not be unjustly restricted nor unduly prejudiced.

To perform the many tasks of administering the Motor Carrier Act, the work of the Bureau of Motor Carriers has been divided among seven sections whose activities are described in the Interstate Commerce Commission's Annual Report for 1936. The duties of the several sections are indicated by the titles of the sections. They include:

The Section of Certificates and Insurance, which is concerned with enforcing the statutory requirements as to certificates of public convenience and necessity for common carriers, permits for contract carriers, and with the surety bonds or other securities or idemnity insurance required of carriers subject to the act.

The Section of Traffic, which was "established to handle all administrative matters arising under sections 216, 218 and 219 of the Act, requiring motor carriers to publish and file their rates, fares, and charges for transportation services."

The Section of Complaints. "All applications for certificates of public convenience and necessity for permits, and for licenses which require hearings are heard by the Section of Complaints through its examiners or by the joint boards (of state officials), with the assistance of the section."

The Section of Finance, which acts upon applications to authorize consolidations, mergers, or leases of motor carriers, or to authorize the issue of securities by applicants having a total capitalization of \$500,000 or more.

The Section of Accounts, which had the difficult task of developing an appropriate uniform system of accounts to be kept

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by interstate common and contract carriers and of putting the same into effect. A classification of accounts has been prescribed for large, Class I, carriers after conferences with representatives of state commissions and motor carriers.

The Section of Law and Enforcement, which included the law branch and the enforcement branch. "The law branch is engaged in the investigation of questions of law that arise in the construction of the act and furnishing opinions upon such points" to the Commission. "The enforcement branch deals with violations and alleged violations of the Act."

The Section of Safety, which is charged with the task of working out reasonable requirements of interstate motor carriers, common, contract, and private, "with respect to qualifications and maximum hours of service of employees and safety of operation and equipment." After study and conferences, the Section "prepared and issued on July 1, 1936, tentative initial regulations"—and about six months later more comprehensive, but still general regulations—applying to common and contract carriers. Ultimately, when the special administrative difficulties have been mastered, regulations covering private carriers of property will be issued.

The conclusion that had been reached by the Interstate Commerce Commission when its report for 1936 was prepared was "that the Motor Carrier Act, 1935, establishes a sound and workable system of regulation for motor carriers." As experience is had in the administration of the law, the organization by which the act is administered and enforced will doubtless be further developed.

### CHANGES THAT ARE RESULTING FROM THE FEDERAL REGULATION OF MOTOR CARRIERS

The changes that are resulting from, and will be brought about by, the Federal regulation of interstate motor transportation and carriers are both direct and indirect, and have their effects not only upon the carriers regulated but also upon the relation of other carriers to those regulated. The Act of August 9, 1935, was enacted at a time when rapid changes were taking place in motor



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transportation, in the equipment being used, in the services being rendered, and in the organization, activities, and business methods of the carriers performing the services. The Act also became effective when the railroads were entering the business of motor transportation and were developing plans for increasing their participation therein. Consequently the Motor Carrier Act is accelerating both the reorganization and integration that are taking place within the motor transportation industry and is furthering the coördination and unification of the services and corporate management of motor and railroad carriers.

The integration taking place within the motor transportation business is of especial significance. While there still are and always will be a great number of motor carriers for hire whose business activities are of small volume and local in scope, an increasing number of large companies are engaged in motor transportation. The first motor carriers to develop long-distance transportation were the bus lines which have so organized and coördinated their services that their passengers may travel to all parts of the country. Many motor-truck companies now operate over long routes, and transcontinental truck transportation services for numerous kinds of freight are being performed by motor carriers for hire. Private motor carriers of their own products have for some years been extending the scope of their operations. The same may be said of carriers for hire, but large-scale operations by such carriers requires the investment of a substantial amount of capital in equipment and other facilities; and, under a régime of ruthless, unrestrained competition such as prevailed in interstate highway transportation prior to the adoption by Congress of the Motor Carrier Act of 1935, profits were very uncertain and investments were risky.

The effective and constructive regulation of interstate motor transportation will help stabilize the rates and revenues of carriers engaged therein. As the public demand for long-distance, large-scale motor transportation increases, companies will be able to develop their services by expansion of their activities or by corporate mergers. The Interstate Commerce Commission will, under the statute, decide what additions to services are needed by the public, and what mergers of motor companies with each

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other or with other carriers are in the public interest. While such regulation places a limit upon the expansion of a motor company's activities, it also makes it possible for a company to invest additional capital in improving and expanding its service without taking the risk of having its invested capital destroyed by cut-throat competition—by the entry of additional and unregulated carriers into a field where additional services are not needed. The Motor Carrier Act of 1935 will further, and is now making possible, the more efficient organization of the business of motor transportation and the more general integration of the services of the carriers engaged therein.

American railroad companies have very definite reasons for increasing their participation in motor transportation. One reason is that they can thereby reduce the cost of the services they are required to perform. The large use of improved highways and, in numerous instances, industrial changes have made the traffic of many branch-line railways very small. In some cases it is possible, with the consent of the Interstate Commerce Commission, to abandon unprofitable branch rail-lines and to substitute therefor transportation by buses and trucks; some branch railroads, however, must, in the public interest, be kept in operation although they are not profitable; but, by using motor-trucks, it is possible to reduce the number of railroad trains run daily and weekly upon the branch line and thus to lower total expenses and possibly to increase traffic receipts. Another advantageous use that the railroads can make of motor-trucks is for handling local freight that would otherwise require the operation of local freight trains over busy main-line divisions. The use of trucks has also made possible the zoning of local railway freight stations, freight being taken on and unloaded by railroad trains only at the zone stations, the handling of the freight between the zone station and other stations being by truck.

Another and, for the present, the most important reason why the railroads should engage in highway transportation is to increase travel and traffic by rail. The buses and trucks that are operated independently of, and in competition with, the railroads, divert passenger and freight business from the rails to the

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roads; while the operation of buses and trucks to supplement and extend railroad services may not only lessen the diversion of traffic from the rails but may enable the railroads to build up their traffic. What the public needs, and what is being brought about not only by the coöperation of the railroads and the independent motor carriers, but also by the greater participation of the railroads in highway transportation, is such coördination and integration of transportation agencies, facilities and services, all under government regulation, as will provide a complete and unified transportation system each part thereof functioning in the performance of the service it can render most efficiently and economically.

One important requisite of a complete transportation service from shipper to consignee is the collection and delivery of less-than-carload freight at all but the smaller local stations. Reference has been made to the steps that have been, and are being, taken by the railroads to install collection and delivery services generally throughout the country. By its decisions the Interstate Commerce Commission has approved of the inauguration and development of collection and delivery services by the railroads. There is every indication that there will be a general installation of what is popularly called "store-door delivery" of commodity freight.

To bring about the desirable integration of railroad and truck services, it is necessary for the railroads to do more than use trucks for collecting and delivering freight in terminals, for handling local freight and freight to and from zone stations, and for taking over the services of branch-line railways. There must be bus-line and truck-line operations to supplement and extend the railroad services and to increase the volume of traffic that may move by rail. When there was no Federal regulation of interstate motor transportation and carriers, the railroads could engage in highway transportation only in competition with unregulated motor carriers. In the development of bus-line services this did not prove to be a serious handicap to the railroads. As the long-distance motor passenger business developed, it tended to become more stabilized—large-scale services were organized; the

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railroads bought a controlling interest in some companies, and numerous other bus-line companies were organized and developed as subsidiaries of the railroads. Even in motor passenger transportation, however, Federal regulation of interstate carriers has improved the conditions under which it is being developed, and there has been a rapid increase in the number of bus lines under railroad control or operation.

The business of motor freight transportation differs greatly from that of bus-line passenger transportation. The number of common and contract carriers in the motor freight service is large, even in interstate haulage, and the affairs of such interstate carriers are largely interwoven with the activities of the much greater number of intrastate carriers. While state regulation of motor transportation had done something to establish order in the relations of motor carriers of freight, the general situation was deplorably unstable. The number of carriers upon many routes and in many sections was excessive, competition of motor carriers with each other and the railroads and waterways was often intense and ruthless. When the railroads, which were fully regulated as regards their rail services, undertook to supplement or extend their services by operating motor-truck lines, they had to compete with irresponsible and hostile opponents; and, while even this did not prevent many railroads from inaugurating motor freight services before the enactment of the Motor Carrier Act, that law so improved the conditions under which such services could be conducted that there was a rapid expansion of railroad operations upon the highways.

The Motor Carrier Act of 1935 has greatly stimulated the development of both bus and truck services by the railroads. The movement thus accelerated had gained much headway by the end of 1934 but, as has been said:

Railway motor transport made greater progress in 1935 than in any year since the railways first became interested in highway transportation. The impetus for this development was provided largely but not entirely by the Motor Carrier Act.

Their investment was doubled during the year. The provision of new services and the expansion of existing services were reflected in renewed purchases of automotive equipment by the railways. In addition,

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the railways initiated a campaign to modernize the highway equipment which they already owned.<sup>11</sup>

Another result of the Federal regulation of interstate motor carriers that will gradually be brought about will be a more definite coördination and systematization of the services and charges of railroad, highway, and other carriers. When waterway and airway carriers have been brought under the regulatory authority of the Interstate Commerce Commission, the actual and adequate coördination of the facilities and service of all classes of carriers can be accomplished. A national transportation system can be changed from a hope to a reality, and as and when this is done there will be a simplification in the freight classification of the several classes of carriers, and their tariffs and rate structures will become less complex and dissimilar. Such changes as these cannot be brought about quickly; but the conditions for such changes having been established by the like regulation of all carriers, there will be an evolution from dissimilarity and complexity to more uniformity and simplicity in freight classification and tariffs.

### GENERAL CONCLUSIONS

The Motor Carrier Act of 1935 was needed and the time was ripe for its enactment. The experience of the states in regulating intrastate motor transportation showed the necessity for Federal regulation of interstate carriers in the interest both of the carriers concerned and of the general public. State regulation could only partially accomplish the task to be performed. The need for and importance of the effective and comprehensive regulation of motor transportation and carriers grew greater with the rapid development of motor transportation, with the changes it was bringing about in the status of the non-motor carriers upon whose continued and efficient services the public was vitally dependent, and with the growing necessity of establishing order in the relations of motor carriers with each other and with other carriers.

The Federal motor carrier statute is a comprehensive one, such a statute as could have been enacted only after the careful

<sup>11</sup> *Railway Age*, Jan. 4, 1936, Vol. 100, p. 90. The statement is from an article by Charles Layng, Motor Transport Editor of *Railway Age*.

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preparation therefor that was made by the House and Senate committees of Congress and especially by the Coördinator of Transportation and his capable staff. While experience in the administration and enforcement of the statute will doubtless make manifest the need for amendments and supplements, the requirements of the law seem to provide adequately for the regulation of both contract and common carriers and to pave the way to a more definite future regulation of the operations of the large and rapidly increasing number of private carriers who are making the public highways a part of the facilities used in the conduct of their business.

The administration of the statute will be a difficult task, one that even the efficient Interstate Commerce Commission could hardly perform, fully and successfully, without the coöperation of the state regulatory authorities having jurisdiction over motor carriers. Such coöperation is being given, in the manner contemplated by the framers of the law, and the means and manner of future coöperation may be expected to evolve as the several problems of administering and enforcing the statute present themselves. There is good ground for believing that the statute can be made effective.

The successful regulation of interstate motor transportation will be of assistance to the states in their regulation of intrastate motor carriers. The Federal and state authorities, each acting separately with regard to its own responsibilities, and both acting in coöperation in dealing with matters of mutual concern, will be able to accomplish more adequately and effectively the entire work of motor carrier regulation. Moreover, the provisions of the Federal statute and the policy followed in its enforcement will influence the states so to amend and supplement their motor-carrier laws and so to change their administrative practices as to bring them into harmony with the Federal statute and with the procedure developed by the Interstate Commerce Commission in the regulation of interstate motor transportation and carriers. Many states have thus far but partially provided for the regulation of the operations of motor carriers within their boundaries. The Federal statute and its administration will give such states a stimulus to action.

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The Federal Motor Carrier Act and its successful administration and enforcement will, year by year, be cumulatively beneficial to the motor carriers, to the railroads and other carriers, and to the general public. The business of motor transportation will, as time passes, be placed upon a progressively better basis; it will be made more stable; there can be a better organization of service; the competitive relations of the motor carriers with the railroads and other carriers can be adjusted to the benefit of all concerned; the coördination of the facilities and services of motor and other carriers can be facilitated; the carriers and the public will be taken one stage nearer the ultimate goal of a national transportation system.

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PART VI

GOVERNMENT AID AND REGULATION  
OF AIR TRANSPORTATION



## CHAPTER XXIII

### STATE AND LOCAL GOVERNMENT AID AND REGULATION OF AIR TRANSPORTATION

THE Government's relation to air transportation and air carriers is in some ways analogous to the relation of the Government to transportation and carriers by water and upon the highways. In each case, nature and the Government provide the way used by the carrier. Other aid is also given to carriers by water and air. The harbors required by carriers by water are generally provided and equipped by the public, as also are some of the water-front terminal facilities. As regards air carriers, most, though not all, of the necessary airports and landing fields are publicly owned and operated. Both airways and waterways are equipped at public expense with the requisites for safe navigation. To facilitate air transportation and to increase the safety of flight, much more equipment is required than is needed for the guidance of carriers using waterways or roadways; but the total cost of establishing, marking, and otherwise equipping an airway is much less than the expense of providing and maintaining inland waterways and operating the facilities connected therewith.

Airways must necessarily be located and lighted, and their use regulated, by the Government. Air carriers could not profitably engage in business unless they were provided with airways charted and equipped for their free use. Moreover, if a private company could provide itself with a well-equipped airway, it would not be allowed to make sole use of it. Airways, like highways, are public ways, subject to such government regulation as is required to assure their safe and proper use. The unrestricted and unregulated use of the air by all air carriers and other users of aëroplanes or airships would be fraught with danger to the public and to those navigating the air, and would make impossible the organized and effective development of air transportation.

## GOVERNMENT REGULATION OF TRANSPORTATION

Liberal public aid, as well as effective government regulation, is necessary for the successful development of aviation. Aërial navigation is one of man's most recent achievements and undertakings. The transportation of persons and property through the air is not only a new enterprise and industry, but one whose practical and efficient development is being accomplished by expensive scientific research, by large expenditures to determine the value of technical changes and improvements in flying equipment, and by the installation and operation of ever better lighting and communication facilities that increase the safety of flight and help to free aviation from the limitations of adverse weather and the difficulties of terrain. The technical improvements that are being made in aviation, and that are in prospect, are of great public importance, and they can be accomplished only by the aid that private enterprise can be given by the cooperation of the Government's scientific and administrative agencies and by the assistance of public funds.

Public aid and regulation of air transportation facilities and carriers are the concern both of the Federal Government, which has jurisdiction over interstate commerce and carriers, and of the states and their local political units, the counties, towns, and cities. The states have authority over intrastate carriers and transportation. Moreover, the property rights involved, in providing facilities for aviation and in prescribing and enforcing regulations to be observed in using the terminal facilities and navigating the air, are rights determined by the states. While air transportation, more than any other kind of transportation, is interstate in character and scope, the states and their political subdivisions have a large measure of authority and responsibility. In view of the fact that aviation is for the most part interstate, it is highly important that the states in exercising their authority over airfields and landing fields and over the operation of aircraft should so far as possible harmonize their requirements with those of Federal regulation. Unnecessary duplicate regulation should be avoided. In general, state regulation should be supplementary to Federal regulation; and, fortunately, the prevailing practice is making that policy increasingly general.

# STATE AID OF AIR TRANSPORTATION

## STATE AID TO AVIATION

The largest local aid to aviation is that given by municipalities or other local governments which have constructed the majority of the airport terminals now in use. In 1936 there were 734 municipal airports and 491 commercial airports. The more important airports are the municipal, the number of which is rapidly increasing as a result of the large aid being given the municipalities by the Federal Works Progress Administration to provide work for the unemployed. The 1936 Annual Report of the Secretary of Commerce states that the Works Progress Administration has undertaken and has completed, or has under construction, 405 airport projects, including 129 airport terminals, involving Federal expenditures of \$54,725,773. The Department's Bureau of Air Commerce assists municipalities with engineering advice on the technical features of their airports, and the Bureau's approval is required by the Works Progress Administration before it will undertake the construction of any port at the request of a municipality.

Between the terminal airports there are intermediate landing fields, most of which are provided and maintained by the United States Department of Commerce. The Federal Government in locating the main airways and equipping them for use establishes landing fields 30 to 50 miles apart. The landing field has its markings and lights, and between the landing fields there is a beacon light each 10 to 15 miles. As was stated in Airways Bulletin No. One, issued in 1932 by the Aëronautics Branch (since June 30, 1934, the Bureau of Air Commerce) of the Department of Commerce, "In establishing intermediate fields the Aëronautics Branch so arranges them that they serve in conjunction with airports and other landing fields along the airway. Using an airway, therefore, an airman may follow the course by watching the lights, and may land at his regular stops, or, if necessary, make landings at airports or intermediate landing fields along the route which average less than 50 miles apart."

Some landing fields are operated by the states that have also provided a large number of marked auxiliary fields. Some fields

## GOVERNMENT REGULATION OF TRANSPORTATION

are privately operated; and there are naval air stations and fields for other governmental uses. The facts as to the number of the several kinds of airports and landing fields in 1936, and the extent to which they were equipped with night-lighting facilities are presented in the following table.

AIRPORTS AND LANDING FIELDS

Type of Field	Number	Number Having Night-Lighting Facilities
Municipal .. . . . . .	734	249
Commercial .... . . . .	491	100
Department of Commerce		
Intermediate Fields .....	289	276
Army Aërodromes . . . . .	63	32
Navy air stations, including		
Marine and Coast Guards ..	26	13
State-operated fields ....	44	8
Marked auxiliary fields .....	626	9
Private fields .....	56	7
Fields for miscellaneous		
Government Activities ....	24	0
<b>TOTAL</b> .....	<b>2,353</b>	<b>694</b>

While the creation and maintenance of airport terminals by the municipalities and the aid that the states give the cities and other local governments in providing airports and landing fields comprise the larger share of the non-Federal assistance given to aviation, there are other kinds of state aid to air transportation and carriers. Some states have made appropriations for aëronautical education, that is, for aviation study in state educational institutions or for schools for aircraft personnel. Several states have exempted aviation property from taxation for a period of years, especially if such property is owned by a city or town. Michigan, in 1929, made provision for preparing a map of the state by aërial photography; while in the same year the State of Ohio enacted a law stipulating that "the legislative authority in each and every municipality in the State of Ohio shall cause said municipality to be marked for aëronautical purposes."

# STATE AID OF AIR TRANSPORTATION

## STATE REGULATION OF AIR TRANSPORTATION AND CARRIERS

Air transportation and carriers are mainly interstate and the Federal Government has jurisdiction over interstate commerce; but state jurisdiction over aviation includes the exercise of authority over a relatively large number of activities; and the legislation that has been enacted by the states covers a rather wide field. This will be indicated by a brief account of the major provisions and requirements of the regulatory state statutes.

No aircraft may be operated without a license and no pilot may operate an aircraft without a license. Aircraft and airmen, like automobiles and their drivers, must meet the requirements fixed by public authority. While the states do not pursue a uniform policy concerning licensing of aircraft and operators, the general practice of the states is to require the interested parties to secure Federal licenses. By 1934, a Federal license for all aircraft operation was required by 37 states, and there were 10 states that required Federal licenses for all commercial aircraft operation. At that time three states were requiring either a Federal or a state license, while two of the states insisted upon a state license for all aircraft operation. There was no state without legislation prescribing aeronautical licensing.

The states in their legislation must designate what authority shall issue licenses for aircraft and airmen and shall have authority to prescribe and enforce air-traffic rules and regulations. Some states have vested regulatory jurisdiction in an aviation or aeronautics commission or board, while other states have given authority over aviation to their public service commission or to some other existing authority. The logical course to follow would seem to be to provide for the regulation of aviation by the Commission that regulates other kinds of transportation, that is, by an air transportation bureau of the state's public service or public utility commission. This would contribute towards the development of a consistent general policy of state regulation of transportation agencies, and would also place the control of aviation in charge of a bureau that could become technically equipped.

Air-traffic regulations issued by state authorities will naturally

## GOVERNMENT REGULATION OF TRANSPORTATION

be practically the same as Federal regulations, which have become comprehensive. The modifications of, or additions to, Federal regulations made by the states will concern mainly the use of the airports. Differing local conditions will call for special rules or regulations to be observed by airmen.

Much of the legislation of the states concerning aviation has to do with airports. It includes legislation enabling municipalities or other political units to create airports—to acquire the necessary grounds, by condemnation of private property if necessary, and to secure the necessary funds by taxation or by the issue of bonds. It enables a municipality or other political subdivision of a state to create an airport. It must receive from the state a grant of authority similar to that contained in the charter of a railroad company which is thereby permitted to exercise the right of eminent domain and raise funds to carry out its project.

When a municipality or other local authority has established an airport, or when one has, with the approval of state authority, been created by a private company, the airport is subject to state regulations concerning its maintenance and operation. The state regulation of an airport includes the granting of a license to operate, the rating of the airport, requirements as to surveys and as to bulletins or reports, the power of the suspension or revocation of licenses, and the inspection and approval of the airport's equipment. The state rules governing the lighting and marking of airports usually conform to the Federal regulations, such conformity being obviously desirable.

It is state legislation and not that of the Federal Government that fixes the air carrier's liability for damages to life or property, and prescribes the regulations concerning such liability. The practice of the states is not uniform. Some states have applied to air carriers the laws as to the liabilities of common carriers, but it is the general policy of the states to define by statute the liability of air carriers for injury to passengers or damage to property transported. Such carriers are also subject to the obligations imposed by employers' liability and workmen's compensation laws, and are also liable for damages that may be done to the persons or property of third parties above whom or over whose property aircraft may be operated. The state regula-



## STATE AID OF AIR TRANSPORTATION

tions as to the air carrier's liability may also require such carrier to file indemnity bonds or carry indemnity insurance, such requirement being similar to that made of motor carriers in many states. The liability regarding injury to persons or property applies to all air carriers operating in the state, those that are interstate as well as those that are intrastate, each state having authority to determine the personal and property rights of its citizens. Suits for the recovery of damages caused by an interstate carrier may be brought against the owner or operator in the state where the damage was done.

Only a few states have enacted laws for the regulation of the charges and services of carriers by air. Some states have given intrastate air carriers of passengers or property the status of common carriers, thus subjecting them to such regulation as is exercised over such carriers. The regulation in such cases is by the state public service or public utility commission having jurisdiction over other intrastate carriers.

The business of air transportation is still in its early developmental stage. Rates and fares must be fixed not only with reference to the costs of service but must also be fixed experimentally to determine the effect of charges upon the volume of traffic and upon net revenues. Moreover, the rates and fares of air carriers must be so adjusted as to divert travel and carriage from the railroads and the highway carriers, whose comprehensive services already cover the field of transportation. Air carriers provide a new and more speedy service at much higher cost. Only by experience can air carriers determine the level at which their charges may be so fixed as to build up their traffic and put their business upon a profitable basis. The stabilization of air transportation charges and services by government regulation will be in order when the business has outlived the experimental stage and has become a seasoned enterprise.

### PROPOSED UNIFORM STATE LICENSING AND REGULATORY LAWS

The importance of securing greater uniformity in the regulation of air transportation by the states is manifest. The intrastate and interstate activities of air carriers cannot be dissociated.

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In the interest of safety of operation there must be uniformity of regulations governing the licensing and use of aëroplanes. However, the difficulty of securing like legislation by the 48 states regarding air transportation or any other subject is real and can be overcome only by the organized effort of those public bodies that can provide leadership. Uniform state laws have been worked out and have been sponsored by the National Conference on Uniform Aëronautical Regulatory Laws. The same movement has received the attention and support of the Bureau of Air Commerce of the United States Department of Commerce, by the National Association of State Aëronautical Officials, by the Aëronautical Chamber of Commerce of America, by the American Bar Association, and by the Chamber of Commerce of the United States.

As regards the licensing of aircraft and airmen, the simplest and surest way to secure uniformity of state action, and also to harmonize state and national regulation, is for each state to require all intrastate aircraft and airmen to be Federally licensed; and the facts already presented show that more than three-fourths of the states have already taken such action. When a state does not require Federal license, but allows intrastate aircraft and airmen to operate with a state license, there is the possibility that the state's requirements will be different from, and less stringent than, those of the Federal authorities. There has been some opposition to the surrender by the states of their jurisdiction over the licensing of intrastate aircraft and airmen, but the trend is fortunately towards vesting in the Federal Government the licensing of all aircraft operation.

The uniform state law for aëronautics that was drafted to serve as a model and that has been followed, with some modifications, by a large number of states devotes the first section to the definition of terms, and then in the successive sections of the draft provides that:

Sovereignty in the space above the lands and waters of this state is declared to rest in the state.

The ownership of the space above the land and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight.

## STATE AID OF AIR TRANSPORTATION

Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water or the space over the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not. [If the aircraft is leased, both the owner and the lessee are liable. The airman who is not the owner or lessee of the aircraft is liable only for the consequences of his own negligence.]

The damage caused by collision [of aircraft] on land or in the air shall be determined by the rules of law applicable to torts on land.

All crimes, torts, and other wrongs committed by or against an aéronaut [airman] or passengers while in flight over this state shall be governed by the laws of this state.

All contractual or other legal relations entered into by aéronauts or passengers while in flight over this state shall have the same effect as if entered into on the land or water beneath.

Dangerous flying is a misdemeanor. Any aéronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this state, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall, while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than \$500 or imprisonment for not more than 1 year or both.

Hunting by aircraft is a misdemeanor. Any aéronaut or passenger who, while in flight within this state, shall intentionally kill or attempt to kill any birds or animals shall be guilty of a misdemeanor and punishable by fine . . . or imprisonment . . . or both.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it and to harmonize, as far as possible, with Federal laws and regulations on the subject.

The foregoing statement of the provisions of a uniform state law for aéronautics indicates the scope and importance of state legislation for the regulation of the use that may be made of aéroplanes and for fixing the responsibilities and liabilities of the owners and operators of aircraft. As has been stated, the largest aid given to aviation by the states, municipalities, and other local governments is in providing and managing airfields.

## GOVERNMENT REGULATION OF TRANSPORTATION

The Bureau of Air Commerce of the United States Department of Commerce has drafted a uniform act containing, among its provisions, those provisions recommended for inclusion in state legislation authorizing and empowering counties, municipalities, and other political subdivisions, "separately or jointly, to acquire establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft either within or without the geographical limits of such political subdivisions and to use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such political subdivisions."

This model for a state statute provides that lands acquired by a political subdivision of the state are "for a public purpose"; that private property may be acquired by purchase or by condemnation proceedings; that counties, municipalities, or other political subdivisions of the state may, if necessary, issue bonds to secure funds for airports or landing fields; that the political authorities that establish airports or landing fields may acquire, by purchase, lease, or condemnation, such private property and such air rights over private property "as are necessary to insure safe approaches to the landing areas of said airports and landing fields"; that in the same manner, the necessary rights may be secured for maintaining needed marks for daytime flying and for suitable lights for the night-time marking of buildings or other structures; that the counties, municipalities, or other political subdivisions shall have authority to construct, equip, and operate airports or landing fields, to adopt regulations and to charge fees or tolls for the use of the ports or fields, or to lease airports or landing fields to private parties for operation or to lease space in airports or landing fields to private parties for improvement and operation, provided that such leases of space do not deprive the public of its rightful use of the airports or landing fields; and lastly that, to meet the expenses incurred in constructing and operating airports and airfields, the counties, municipalities, and other political subdivisions may appropriate funds raised "by taxation or otherwise," or may use for such

## STATE AID OF AIR TRANSPORTATION

purpose "moneys derived from said airports or landing fields."

As was stated in an explanatory note appended thereto :

This act authorizes counties, municipalities, and other political subdivisions of the State, separately or jointly, to acquire, improve, expand, operate, and police airports and landing fields either within or without the geographical limits of such political subdivisions, and declares such airports and landing fields to be for a public purpose. It provides for acquisition of property, air rights necessary to insure clear approaches, and easements for the marking of obstructions; for adoption of regulations and establishment of fees and charges; for leasing to private parties for operation; and for raising moneys to carry out the provisions of the act.

The police power of the local governments may be exercised very effectively through the enactment of suitable zoning ordinances for the promotion of the safety of the public by insuring unobstructed air space for the landing and taking off of aircraft utilizing airports and landing fields acquired or maintained under the provisions of this act. It is realized, however, that under certain conditions, such as the establishment of new airports or landing fields, the expansion of existing handling facilities, or the improvement of the aerial approaches thereof, it may be necessary to apply the power of eminent domain in the condemnation of air rights.

The Bureau of Air Commerce of the United States Department of Commerce, in addition to performing the important task of regulating and promoting interstate aviation, has been helpful to the states in legislating concerning intrastate air transportation and in making such legislation effective by providing the facilities needed for the successful development of both interstate and intrastate aeronautics and air commerce. The Federal Government is the natural and necessary leader in the development of aviation and air transportation, and the coöperation of the states with each other and with the Federal Government is making that leadership successful. The Federal aid and regulation of air carriers and transportation will be discussed in the following chapter.

### CONCLUSIONS

Government aid is necessary for the successful and satisfactory development of aeronautics and air transportation. Government

## GOVERNMENT REGULATION OF TRANSPORTATION

assistance in the technical improvements is helpful; government inspection and regulation are required in the interest of safety; private enterprise, unaided by the state and Federal governments, can not profitably provide all the requisite facilities for air transportation; the national, state, and local governments must coöperate with carriers to enable them to succeed.

The states and the local governments have their responsibilities. Aviation requires their aid as well as that of the Federal Government. The task of providing and operating airports belongs especially to the states, municipalities, counties, and other political subdivisions of the states. The states can also provide needed landing fields supplementary to those otherwise established.

State regulation of air transportation and carriers should be in harmony with, and should supplement, Federal regulation. The licensing of all aircraft and airmen should be by the Federal Government, the states should require all intrastate aircraft and airmen to secure Federal licenses. Fortunately this is now the practice of nearly all the states.

There is still too much diversity in the air transportation laws of the states, but the trend is towards greater uniformity, not only as regards the licensing of aircraft and airmen, but also in other matters. This trend towards greater uniformity has been and is being furthered by the international organizations of those interested in the construction and operation of aircraft and of those concerned with Federal and state regulation of air commerce and carriers. The drafts of model uniform aeronautical regulatory laws by such organizations, and by the Bureau of Air Commerce of the United States Department of Commerce have influenced state legislation, and have thus been of benefit to the aviation industry and to the public.

## REFERENCES

Much has been written concerning the Federal aid and regulation of air transportation and carriers, but there is not much literature dealing with state legislation. The student will find the first two of the following references helpful:

## STATE AID OF AIR TRANSPORTATION

Regulation of Air Transportation Agencies. Report of the Federal Coordinator of Transportation, Senate Document No. 152, 73rd Congress, 2nd Session (1934). Appendix C, pp. 257-260, contains the best statement available regarding state regulation of air transportation and carriers.

Rohlfing, Charles C., *National Regulation of Aeronautics* (University of Pennsylvania Press, Philadelphia, 1931). Chap. ix, pp. 197-227, discusses "State Legislation." The volume contains a good bibliography of sources of information and a few of the references are to the reports of state regulatory commissions.

*Air Commerce Bulletin*, issued monthly by the Bureau of Air Commerce and the *Aéronautics Bulletins*, published by the same bureau, are valuable sources of information concerning the several phases of aviation, and should be consulted by the student of the aid and regulation of air transportation and carriers by the states, municipalities, and other local political units.

*Aircraft Year Book*, Vol. 18, 1936 (published annually). Consult chapters on "State Aviation Activities" and "Laws and Regulations."

Annual Reports of the Bureau of Air Commerce of the United States Department of Commerce. The report of the Bureau is now included in the annual report of the Secretary of Commerce.

*Aviation*, a monthly magazine that has been published from 1916 to the present. It contains information of value to the student of aeronautics and air transportation. Some, but not much, data concerning state aid and regulation may be found by consulting the files of the magazine.

Report of Federal Aviation Commission, Jan. 1935, "Airports," pp. 111-117.

## CHAPTER XXIV

### FEDERAL AID OF AIR TRANSPORTATION

THE successful and adequate development of aviation and air transportation in the United States, as was stated in the preceding chapter, requires both government aid and government regulation; and as *aéronautical* activities are much more interstate than intrastate the Federal Government's responsibilities as regards aid and control are much greater than are those of the states. Moreover, the use of *aéroplanes* for international flight and transportation services is large and is increasing, thus making necessary the adoption and enforcement by the United States and other countries of international agreements as to the rights and obligations of aircraft and airmen when they pass beyond the borders of the country by which they have been licensed.

It is the military and naval importance of the *aéroplane* that is first thought of when considering the Government's relation to *aéronautics*; but, while the *aéroplane* has become a most destructive instrument of offensive warfare and has brought the calamities of war to the homes and lives of the entire population of combatant nations, the manifold uses, direct and indirect, that the Government makes of the *aéroplane* in times of peace not only justify, but emphasize the importance of, liberal public aid and a constructive and helpful policy of government regulation of aviation.

While government aid and regulation of *aéronautics* and air commerce and carriers are interrelated—regulation often being of assistance to those subject thereto—it will be well to simplify the discussion of the complicated subject by presenting the facts regarding aid separately from the consideration of government regulation as it is now exercised and as it may well be extended. The present chapter will deal with government aid to aviation.

The *aéroplane*, in addition to making possible the rapidly growing air-mail service, which constitutes the Government's first and



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major peacetime interest in aviation, is being increasingly used by a number of government agencies, among them being the United States Coast Guard and Life Saving Service, the United States Coast and Geodetic Survey to assist in mapping and charting, the United States Hydrographic Office for similar purposes, the United States Geological Survey for aerial photographing, the United States Forestry Service for fire patrol and other purposes, the Soil Conservation Service for making surveys and maps, the Tennessee Valley Authority for the same purpose, and the Public Health Service which uses aëroplanes for making regular inspections and for rendering assistance. Many of the present activities of the Government are made possible by the aëroplane and the airways. If to the agencies of the Government that make use of the aëroplane in carrying on their activities there be added the departments and bureaus that are concerned with aiding or regulating of air transportation and carriers it will be found that there are 29 government offices that have something to do with aëronautics.

### FEDERAL AID TO AVIATION AND AIR TRANSPORTATION PROVIDED BY THE AIR COMMERCE ACT OF 1926

The aid given aëronautics by the United States is rendered by several branches of the Government and includes four general kinds of assistance: (1) scientific aid rendered by the Bureau of Air Commerce of the Department of Commerce and by the Aëronautics Research Division of the National Bureau of Standards, (2) the locating and equipping of airways by the Bureau of Air Commerce of the Department of Commerce, (3) the subsidizing of the operations of the principal air-lines through liberal contracts for carrying the mails, the contracts being made by the postmaster-general at rates fixed by the Interstate Commerce Commission within limits prescribed by statute, and (4) prescribing and enforcing such rules and regulations concerning aircraft, airmen, and flight as enable airways to be more largely and more safely used. Air-traffic rules as well as airway equipment and facilities are an aid to aviation.

The aëroplane is a complicated mechanism whose technical

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efficiency is constantly being increased by scientific research. Materials of lighter weight and greater strength are being used in the construction of aëroplanes of larger capacity. More powerful engines of greater reliability and of less weight per unit of power are being employed. Improvements are being made in the lighting of airways, airports, and landing fields, and, the radio is making possible the safe piloting of aëroplanes at night or in fog or clouds. The aëroplane and its navigation are being developed by the separate and coöperative labors of many interests, by the designers and manufacturers of aëroplanes and radio apparatus, by the air-line companies that use the planes, by the scientific workers in the mechanical and electrical engineering laboratories of the universities, by the scientific activities of the National Bureau of Standards and the Bureau of Air Commerce of the Department of Commerce, by the scientific men in the Army and the Navy, and by others. From its creation by Act of Congress approved March 3, 1915, to date there has been a National Advisory Committee for Aëronautics which has supervision of aëronautical research in coöperation with the scientific agencies of the Government. "Its work covers (a) the present trend of design and construction toward airplanes of higher speeds; (b) America's present aircraft procurement programs for the national defense; and (c) the current demands of (1) national defense, (2) the air-transport industry, and (3) the private flyer for still greater efficiency and safety."<sup>1</sup>

The National Bureau of Standards carries on its scientific work concerning aviation through its Aëronautics Research Division whose activities are subdivided among five sections, the Radio, Lighting, Aircraft Engine, Wind Tunnel, and Engineer sections. The Bureau of Air Commerce of the Department of Commerce aids aviation through several of the subdivisions of its organization, especially through its Airways Operation Division and its Development Section. The kind of technical aid given and the

<sup>1</sup> Quoted from a report on Safety In The Air (Senate Report, 75th Congress, 1st Session), made Feb., 1937, to the U.S. Senate from the Committee on Commerce by Senator Copeland, Chairman. This report and the printed copy of the testimony presented to the Committee Jan. 13, and Feb. 2, and 16, 1937, discuss the technical questions of aëronautical development and the problems of government regulation of aviation. The report is an especially instructive document.

## FEDERAL AID OF AIR TRANSPORTATION

method followed in promoting the technical improvement of aviation may be illustrated by referring to what the Bureau of Air Commerce has been doing during the past two years concerning radio development. In its Annual Report for the year ending June 30, 1936, the Bureau of Air Commerce states that:

About a year ago, there was formed under Bureau sponsorship a Radio Technical Committee for Aëronautics, having representation from the following organizations: Bureau of Air Commerce, National Bureau of Standards, Army, Navy, Marine Corps, Coast Guard, Federal Communications Commission, Aëronautical Radio Inc., air-line operators and manufacturers. This committee was formed to survey problems in aëronautical radio development and allocate them to sub-committees for detailed study and the accomplishments have been gratifying.

The Report from which this statement is quoted lists several advances made during the year covered by the report in radio services in aid of aviation, and states what is being done to solve a number of problems of communication, of instrument flying, and of converting the aëroplane's "landing operation from a hazardous maneuver to a relatively simple and safe operation." The many difficult and highly technical scientific problems connected with the development of aëronautics are being given careful and most helpful research by the several scientific branches of the Federal Government. This, however, is not the place for an explanation of the scientific aids to aviation that are being rendered by the Government.

The Federal Government's assistance to air transportation and its promotion of air commerce began with the enactment by Congress of the Air Commerce Act, approved May 20, 1926. This law provided both for aid and for regulation of aviation by the Secretary of Commerce who was to foster air commerce in accordance with the provisions of this act and for such purpose:

- (a) To encourage the establishment of airports, civil airways, and other navigation facilities.
- (b) To make recommendations to the Secretary of Agriculture as to necessary meteorological facilities.
- (c) To study the possibilities for the development of air commerce and the aëronautical industry and trade in the United States. . . .
- (d) To advise with the Bureau of Standards and other agencies in the

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executive branch of the Government in carrying forward such research and development work as tends to create improved air navigation facilities. The Secretary of Commerce is authorized to transfer funds available . . . to any such agency for carrying forward such research and development work in coöperation with the Department of Commerce.

- (e) To investigate, record, and make public the causes of accidents in civil air navigation in the United States.
- (f) To exchange with governments through existing governmental channels information pertaining to civil air navigation.

The foregoing statutory provisions enable the Secretary of Commerce to assist aviation development by establishing and equipping airways with facilities other than airports which are to be provided by private interests or by municipalities or other local government authorities; and the statute authorizes the Secretary of Commerce to use funds appropriated therefor by Congress “(1) to establish, operate, and maintain along such airways all necessary air navigation facilities except airports; and (2) to chart such airways and arrange for publication of such airways, utilizing the facilities and assistance of existing agencies of the Government so far as practicable.”

The legislation adopted in 1926 resulted in the establishment in the United States during the following 10 years of 83 domestic air passenger transport routes having a total length of 28,385 miles, and 22 United States-foreign air passenger transport routes with a total length of 21,060 miles. These domestic routes, in 1936, were being used by 22 scheduled air transport operators and the United States-foreign routes by 7 scheduled operators.

Although the 1926 statute excludes airports from the air navigation facilities that are to be established and aided by the Federal Government, municipalities are now being aided in creating and developing their airports by the allotment of large sums at the disposal of the United States Public Works Administration. As was noted in the preceding chapter, the Secretary of Commerce in his report for 1936 states, “The W.P.A. has undertaken and has completed or has under construction 405 air port projects, including 129 air transport terminals involving Federal expenditures of \$54,725,773.” In the above mentioned Report by Senator Copeland, an additional participation by the

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Federal Government in airport expenses is recommended. It is stated that, "It is now a well-established fact that all major air terminals need not only a close-in airport, but also an auxiliary instrument landing terminal." The close-in terminal should be convenient to the center of the community served, the auxiliary terminal should be "out in the suburbs, on land enjoying all the natural benefits of a safe airport such as perfect approaches." The close-in terminal "should be reserved at all times exclusively for scheduled air transport," while "the auxiliary adjacent 'far out' field should normally be confined to private and nonscheduled flying. In bad weather, however, it would be employed by the airlines in blind landings when private fliers are seldom in the air."

The Copeland Report, which was made in February, 1937, states that, "During the last year the trend has been towards using this combination of two airports notably at Los Angeles, Pittsburgh, Detroit and the New York metropolitan area, including Newark." The report suggests that "the Government could equip these alternate fields with every proven blind landing facility known"; and that "this would discourage pilots attempting to get in to the fair-weather 'close-in' airport when conditions were the least doubtful, and at the same time keep the nonscheduled fliers isolated from congested airport terminals." The Report also recommends that the Government establish substations for mail at the auxiliary fields, and that "the Federal Bureau of Public Roads instigate a program of constructing the so-called 'super highways' from one approved far-out field in each large city to the business centers." Such highways, if built without grade crossings, would greatly reduce the time in getting to or from an airport several miles out of a city.

Without presenting further details concerning the aid (other than that by air-mail subsidies which will be separately discussed) of the Federal Government to aviation and air commerce, the scope of such assistance and the results that have been thereby accomplished may be concisely summarized by quoting briefly from the Copeland Report:

Our Federal Government has developed a series of domestic airways, forming a network which covers much of the continental United States. As is the case with facilities designed to aid coastwise and inland water-

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way navigation, the Federal Government has installed and owns most of the essential parts of the air-navigation facilities. One important factor in the successful operation of civil aëronautics has been the aid given by the Government in the way of increasing radio facilities.

The operations of our scheduled air lines, including the transportation of mail by air, have developed into the world's most highly successful systems. American commercial aëronautics is supreme throughout the world when judged by any of the accepted standards of appraisal. This is true whether we consider it in terms of number of miles of organized air routes; miles flown per day; passengers, mail and express carried per day; infrequency of accidents to planes and equipment; number of commercial airplanes in operation; numbers of the personnel operating them; comfort and convenience of operation; or the capacity for the production of airplanes and equipment. . . . In every important respect the United States leads in civil and commercial aëronautics.

The Copeland report does not claim that the United States leads in military aëronautics; but, on the contrary, states that, "In the performance of certain experimental military aircraft due to the availability of an approved and proven higher-horsepower engine, some other countries excel." The report states that while "an aëronautical program complete in all essentials, is . . . essential to the national defense . . . the size of the [military] air forces for a major emergency will be vastly greater than it would be prudent to maintain in time of peace. . . . There must be maintained in time of peace a satisfactory nucleus of a wartime aëronautical force," and the Government should make provision for meeting wartime needs by so aiding aviation in peacetime as to create "an industry that is capable of rapid expansion to meet the Government's needs in an emergency. . . . The general condition, productive capacity, and operative ability of our commercial aircraft establishments are of national concern"; hence, "in time of peace, America should encourage and never hamper any well-conceived form of commercial endeavor in aëronautics."

### FEDERAL AID TO AVIATION BY AIR-MAIL CONTRACTS, 1925 TO 1934

The organization and development of scheduled transportation of passengers and express by regular air-line carriers have been

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made possible by the liberal payments made to such companies for their air-mail transportation services. Instead of appropriating funds as subsidies to companies to enable them to establish and develop designated air-line services, as has been the policy of many foreign countries, the United States for the last 10 years has, in effect, subsidized air transportation by contracting with companies operating over the main air routes in the country for the carriage of mail. The basis and the amount of payments made to the contracting companies have been changed several times, but in general the payments have not been limited to the amount of the additional expense which the air-line carriers incur by transporting the air mail. The payments have been such as to enable the carriers to operate and develop their services as carriers of passengers and, latterly, of express, as well as carriers of the mails. In other words, the air-mail payments have been subsidies by which the Government has made possible the rapid development of the organized and expanding service of air transportation of people, packages, and mail.

The history of the present policy of the Federal Government towards air-mail subsidies, as it has evolved during the past two decades, need be but sketched in outline, although such subsidies constitute a large part of the direct financial aid of the Government to air carriers and commerce.<sup>2</sup> The transportation of mail by *aéroplanes* quite naturally began during the participation of the United States in the World War. On May 15, 1918, scheduled air-mail service was started over the route between New York and Washington, D.C., by the coöperation of the Post Office Department and the War Department, the mail being carried by army planes and aviators. This coöperative arrangement did not prove to be satisfactory, and on August 12, 1918, the Post Office Department took over the operation of the transportation service.

<sup>2</sup> A good account of the origin and development of the air-mail service in the United States, and of air-mail legislation is given in *The Economics of Air Mail Transportation*, by Paul T. David. The book was published in 1934, shortly after the annulment of the air-mail contracts by the Postmaster-General, February 9, 1934, and before the enactment of the present Air Mail Act that was approved June 12, 1934. The volume was prepared under the auspices of, and was published by, the Brookings Institution, Washington, D.C.

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Upon the conclusion of the World War, there was a demand for the expansion of the air-mail service; but the *aéroplane* was still in the early stages of technical development, and the country's airways had yet to be laid out, lighted, and equipped with terminals and landing fields. During 1919, an air-mail service between New York and Chicago was started, and in 1920 the carriage of mail by air was begun from Chicago to Omaha and thence to San Francisco. However, the service was not reliable and there were many plane accidents. Although the post-war experiment of using the war-built planes for the mail service was soon given up, and better planes were constructed for the use of the Post Office Department, neither *aéroplanes* nor airways had yet reached the stage that made possible a satisfactory service. Despite these early handicaps, the Post Office Department went ahead with its task and made very substantial progress. Night flying upon regular schedule was started in 1924, and on July 1st of that year a regular transcontinental service was inaugurated, although it was not until two years later that the airway had been lighted through to San Francisco.

The substitution of contract service in place of government transportation of air mail was made possible by the passage of the Air Mail Act approved February 2, 1925. Congress had regarded the performance of the service by the Government as a temporary measure to be given up when regular air-line carriers had become able to perform the service under contract. Acting on the authority given him by the Act of 1925, the postmaster-general entered into contracts from time to time whereby service over one route after another was arranged for; and, by the end of 1927, the Post Office Department had ceased to concern itself with the operation of *aéroplanes* and with the creation and equipment of airways. In the meantime, Congress, by adoption of the Air Commerce Act, approved May 30, 1926, had provided for the development and regulation of *aéronautics* by the Department of Commerce; and the Secretary of Commerce had placed the administration of that act in charge of a Bureau of *Aéronautics*, now the Bureau of Air Commerce. Reference has been made in this chapter to the aid that is being given aviation by the Bureau of Air Commerce. An account of the regulation of air



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carriers by the bureau will be given in the chapter that follows.

By the Air Mail Act of 1925, the rates of postage on air mail were "not to be less than 10 cents for each ounce or fraction thereof," but the postal rates actually charged were 10 cents an ounce or fraction thereof for one postal route with an increase of five cents per ounce for each zone into which the country was divided. This complicated scheme of air-postage rates was changed February 1, 1927, when a rate of 10 cents per half ounce between any points in the United States was adopted. In contracting for the carriage of air mail the Postmaster was authorized by the 1925 Act to pay the carriers "not to exceed four-fifths of the revenue derived from such airmail, and further to contract for the transportation by aircraft of first class mail other than airmail at a rate not to exceed four-fifths of the revenues derived from such first class mail." The complicated scheme of air-postage rates made it difficult to carry out the contract system satisfactorily. The Act of 1925 protected the Government against loss from the air-mail service; but the air-postage rates were so high as to prevent a desirable development of air mail. The Act was not so effective as was desirable in increasing the volume of mail or in furthering the development of aviation although contracts were made during the winter and spring of 1926 for air-mail services over several routes.

To remedy the defects of the Act of 1925, Congress passed the Act approved June 3, 1926, which authorized the postmaster-general to make contracts for transportation by air of air mail and of other first-class mail at:

Fixed rates per pound, including equipment, under such rates, rules, and regulations as he may prescribe, not exceeding \$3.00 per pound for air mail for the first 1,000 miles and not to exceed 30 cents per pound additional for each additional 100 miles or fractional part thereof for routes in excess of 1,000 miles in length, and not exceeding 60 cents per pound for first class mail other than air mail for the first 1,000 miles, and not to exceed 6 cents per pound additional for each additional 100 miles or fractional part thereof for routes in excess of 1,000 miles in length.

Promptly after the passage of this law, the contracts that had been made under the 1925 Act for the carriage of mail by air

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routes at a percentage of the postage were changed and the contractors were paid upon the poundage basis provided by the amendment of June 3, 1926. This somewhat increased the compensation received by the air-lines, but did not involve a loss to the Government, until the postage rates for air mail were changed, February 1, 1927, to a flat air-mail rate of 10 cents per half ounce for the entire country. This change in the postage rate was an improvement, but the rate was still too high to cause the air mail to be largely used. The contractors were paid widely varying amounts per aëroplane mile for carrying like amounts of mail because the poundage rates were the same up to 1,000 miles, but, in general, the volume of air mail was not sufficient to enable the carriers to make a profit from the services rendered. It was the Air Mail Act, approved May 17, 1928, that gave the air-mail transportation service its first large government assistance.

By the Act of 1928, it was provided that "the rates of postage on air mail shall not be less than 5 cents for each ounce or fraction thereof," and acting under the authority thus conferred the postmaster-general fixed air-mail postage rates, effective August 1, 1928, at 5 cents for the first ounce and 10 cents for each additional ounce, the rates for packages being \$1.55 for the first pound and \$1.60 for each additional pound, instead of \$3.20 a pound. The reduction in postage rates was followed by an increase of 95 per cent in the volume of air mail; but the Government's revenue therefrom did not increase proportionately; while the pay for the carriage of the air mail increased *pari passu* with the gain in the weight carried. During the 11 months from August 1, 1928, to the end of the fiscal year, June 30, 1929, the Government's receipts from air-mail postage were only 40 per cent of the expenses, most of the expenses consisting of the payment made to contractors for carrying the mail. Without intending to do so, the Government had adopted a policy of granting large subsidies to air-line operators.

The Act of May 17, 1928, did not change the weight basis that had been fixed by the Act of 1926 for payment for carrying the air mail, but provided that the postmaster-general might negotiate with air-mail contractors who had rendered satisfactory

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service for two or more years for the surrender of their contracts and the substitution therefor of an air-mail route certificate. The certificate granted a contractor might be for a period of 10 years from the beginning of his carrying of mail under contract, and "The rate of compensation to the holder of such an air mail route certificate shall be determined by periodical negotiation between the certificate holder and the Postmaster-General," the compensation not to be greater than that provided for in the original contract. This made it possible for the postmaster-general to substitute, for the original route contracts, certificates for routes, the payment for the transportation services to be fixed by negotiation, that is, the postmaster-general had authority to bring about the adjustment of payments for air-mail transportation. For example, the postmaster could have made the reduction in air-mail postage that he made August 1, 1928, conditioned upon a reduction in the payment made for carrying the mail, and could thus have controlled the subsidy granted to air-mail carriers. However, no move was made to change the basis or terms of air-mail contracts until Postmaster-General Harry S. New was succeeded in office by Postmaster-General Walter F. Brown who called the air-mail contractors in conference first in May, 1929, and then again, after needed information had been obtained, on September 30, 1929.

These conferences led to no immediate change in the relations of the Government and the carriers of air mail. The contractors had no desire for a change; while Postmaster-General Brown's policy was determined by his desire to accomplish large results in building up air transportation. He wanted to bring about the establishment of a general system or net of airways, he favored the building up of large and strong companies by the consolidation of the numerous ones into a limited number; he wanted to have authority, by extending existing air-mail routes, to develop them into longer ones serving a greater number of cities and sections of the country; and, in general, he favored using liberal government payments for the carriage of air mail as subsidies that would enable the air-lines to provide and develop passenger services. The methods that were followed by the postmaster-general's associates, and that were approved by him, in dealing

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with the air-line companies, were not what they should have been, but the aims he sought to accomplish were commendable and met with the general approval of Congress and the public.

The policy favored by Congress, and also by the postmaster-general, was embodied in the Air Mail Act, approved April 29, 1930, the Watres Act, which amended the 1928 Act by changing the basis of air-mail transportation payments and contained other provisions recommended by the postmaster-general. The Watres Act authorized the postmaster-general to contract with the lowest responsible bidder for carrying the air mail "at fixed rates per mile for definite weight spaces, one cubic foot of space being computed as the equivalent of nine pounds of air mail, such rates not to exceed \$1.25 per mile." The Act also provided that, where the air mail moving between designated points did not exceed 25 cubic feet or 225 pounds per trip, the payment might be at "a rate not to exceed 40 cents per mile for a weight space of 25 cubic feet," and that when air mail did not occupy all the space other first-class mail could be included to make up the maximum load. An especially important provision of the law was that contained in Section 7 which was that, "The Postmaster-General, when in his judgment the public interest will be promoted thereby, may make any extensions or consolidations of routes which are now or may hereafter be established."

The Watres Act of 1930 gave the postmaster-general wide discretion and authority. As under the Act of 1926, he was to select the air-lines to be aided by awarding contracts for the carriage of mail "between such points as he may designate." He was given authority to "make any extensions or consolidations of routes" for which air-mail contracts had been made; and, in subsidizing air-lines by contracts for carrying the mail, he was not limited by the weight of the mail to be transported, the amount paid being based upon the space provided by the carriers. In the exercise of his discretion and authority the postmaster-general, in calling for bids for the transportation of mail by designated routes, could fix the conditions of bidding for contracts, he could stipulate what mail and passenger services should be performed by contractors, he could make requirements as to the carriers' equipment and employee personnel, as to accounts

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to be kept and reports made, and, in fixing the mail payments (within the statutory limits), he could take into account the covering of losses that the carrier might incur in performing stipulated passenger services. While the statute was designated an air-mail act, its purpose was the promotion and regulation (as regards other than safety matters) of air transportation by the postmaster-general.

The need for the regulation of air transportation and of the competitive relation of the large number of air carriers that had come into existence was manifest. What was needed was the development of an adequate number of strong carriers capable of performing passenger and mail services with increasing efficiency. In 1928 and 1929, speculative enterprise had brought into air transportation as into other business activities too many participants. The grouping and consolidation of routes and carriers were involved in the formation of a national system of airways composed of competitive and complementary units. The manner in which this was done was not however, like Cæsar's wife, above suspicion.

Promptly after the enactment by Congress of the Watres Act, the postmaster-general called a conference of representatives of the existing air-mail carriers and also of the more important passenger lines that had no air-mail contracts. A committee of this conference was created to prepare plans for a group of air-transport lines that would together constitute a country-wide system. This committee recommended that two additional trans-continental air-mail routes be added to the one from New York to San Francisco. Such routes were established, and contracts were let in August, 1930. Subsequent studies of what took place in working out these routes, and in bidding for mail contracts, indicate that the parties concerned had an understanding with each other and that the contracts that were awarded were in harmony with a prearranged program.

It is not necessary, in this discussion of government aid to air transportation, to go into details as to how the postmaster-general worked out a network of air-lines under the authority given him by the Act of 1930. At the end of 1933, there were 10 carriers providing air-mail transportation over the country's

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network of airways. Most of the 10 carriers were formed by the consolidation of smaller companies or by means of holding companies controlling subsidiaries. The routes over which these companies operated had been built up partly by the creation of new routes and partly, and to a large extent, by the extension of old routes. It could hardly have been the intention of Congress that such large use should be made, as was made, of the power to build up air routes by the extension of the shorter routes, that is, by applying to a greatly extended route an air-mail contract first granted to a short line; but, by the exercise of his authority to enlarge mail services and payments, and by his power to stipulate that air-mail carriers should provide for designated passenger service and to grant incentives for improvement in equipment and services, the postmaster-general was able rapidly to build up air transportation systems and services. The postmaster-general did not have authority to regulate, and the Government did not exercise the authority to regulate, the entry of carriers into air transportation; and, in consequence, there were many more air carriers than could operate profitably, competition was severe, and there was then the need, as there is to-day, of public control of the competitive practices, as well as the monopolistic and other interrelations of carriers by air.

There can be no question that the present extensive system and service of air transportation in the United States are the result of the aid that the Government has given in mail subsidies to carriers by air during the past 10 years. The growth of the air-mail service, during each year from 1926 to 1936 inclusive, the increase in length of the routes over which air mail was carried, the miles flown annually in carrying the mail, the weight of mail transported, and the cost of the service to the Government are shown by the following table taken from the 1936 Annual Report of the postmaster-general. The table also shows the temporary effect upon mileage flown and the cost of service to the Government caused by the cancellation of all air-mail contracts in 1933 and the working out of new contracts under the Act approved June 12, 1934, an account of which is given in the following paragraphs.

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AIR MAIL SERVICE: STATISTICAL REPORT SHOWING THE MILES OF SERVICE SCHEDULED AND ACTUALLY FLOWN, WEIGHT OF MAILS DISPATCHED, AND THE AMOUNT PAID AIR-MAIL CARRIERS DURING THE FISCAL YEARS 1926-1936

Fiscal Year	Miles of Route	Miles of Service		Total Weight of Mails Dispatched (pounds)	Cost of Service
		Scheduled	Actually Flown		
1926..	3,597	411,070	396,345	* 3,000	\$ 89,753.71
1927..	5,551	3,092,016	2,805,781	473,102	1,363,227.82
1928..	10,932	5,999,948	5,585,224	1,861,800	4,042,777.16
1929	14,406	11,032,508	10,212,511	5,635,680	11,169,015.13
1930..	14,907	16,228,453	14,939,468	7,719,698	14,618,231.50
1931..	23,488	22,907,169	21,381,852	8,579,422	16,943,605.56
1932 .	26,745	34,509,483	32,202,170	8,845,967	19,938,122.61
1933	27,679	38,114,425	35,909,811	6,741,788	19,400,264.81
1934	* 28,820	31,223,641	29,111,474	6,476,919	† 12,129,959.64
1935	28,884	33,770,091	31,143,853	10,775,248	† 8,813,270.21
1936..	29,198	40,795,338	38,699,449	15,377,993	† 12,034,953.89
TOTAL ....		238,084,142	222,387,938	72,490,617	\$120,543,182.04

\* Advertised mileage of new system.

† Final adjustment pending.

## FEDERAL AID TO AVIATION BY THE AIR MAIL ACTS OF 1934 AND 1935

Being convinced that there had not been real competitive bidding in awarding air-mail contracts, but that there had been a secret understanding among those bidding—which understanding was not unknown to the government officials—the postmaster-general, by order issued February 9, 1934, canceled the contracts, effective February 19th. An arrangement was made with the Army Air Corps to transport the air mail. The Army Air Corps made such preparation for the service as could be hastily made in the 10-day period. Army planes were so changed as to provide space for the mail to be carried and, so far as practicable, the planes were fitted up with radio equipment for blind flying and army pilots prepared themselves as best they could. It is not surprising that the experiment of having the air-mail service

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performed by the Army Air Corps was not a success. The unusually adverse weather conditions partly accounted for what took place, but real success could hardly have been possible. The planes used were not adapted to the service to be performed, and they were manned by pilots without the necessary experience or training. During the first week of operation six operators lost their lives and later five more men were fatally injured. The postmaster-general had not intended to have the Army Air Corps serve permanently as the carrier of air mail, and, as the results of the temporary service were not satisfactory, he realized that the service must be transferred to experienced civil air-line carriers. Accordingly in May while the legislation that became the Air Mail Act of June 12, 1934, was still pending, bids were solicited for temporary contracts covering the several major air routes. The payments made under the contracts awarded were based on mileage, the contracts being let to the lowest responsible bidders, and the compensation ranged from 18 cents to 38.9 cents per plane-mile depending upon the length and character of the several routes.

The coöperative activity of the committees in Congress and the Post Office authorities resulted in the enactment of the Air Mail Act adopted by Congress June 6, 1934, and approved by the President June 12th. This law, as amended by an act approved August 14, 1935, is the one now in force. While the Act of 1934 was intended to provide for government aid to the development of aëronautics and air transportation, the amount of assistance provided is less than had been given by the 1930 Act, and the conditions and manner of giving aid are more definitely defined and safeguarded. In general, the 1934 statute prescribed the maximum limit within which payments for air-mail transportation shall be fixed; the postmaster-general is empowered to award contracts to responsible bidders; but the Interstate Commerce Commission is given authority to fix "the fair and reasonable rates of compensation over each air mail route." The main provisions of the Act of June 12, 1934 are as follows:

The Postmaster General is authorized to award contracts for the transportation of air mail by aëroplane between such points as he may designate, and for initial periods of not exceeding one year, to the lowest



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responsible bidders. . . . The base rate of pay which may be bid and accepted in awarding such contracts shall in no case exceed  $33\frac{1}{3}$  cents per airplane-mile for transporting a mail load not exceeding three hundred pounds . . . plus one-tenth of such base rate for each additional one hundred pounds of mail or fraction thereof . . . except that in no case shall payment exceed 40 cents per airplane-mile. . . .

No contract or interest therein shall be sold, assigned or transferred, by the person to whom such contract is awarded, to any other person without the approval of the Postmaster General. . . .

The Postmaster General . . . may grant an extension of any route for a distance not in excess of one hundred miles . . . and the rate of pay for such extension shall not be in excess of the contract rate on that route. . . .

The Postmaster General may designate certain routes as primary and secondary routes, and shall include at least four transcontinental routes and the eastern and western coastal routes among primary routes. . . .

The Postmaster General shall not award contracts for air mail routes . . . in excess . . . of 29,000 miles, and shall not establish schedules for air mail transportation on such routes and extensions in excess of forty million airplane miles [per annum]. . . .

Authority [was also] conferred upon the Postmaster General to [extend] any contract let by him prior to the passage of this Act . . . for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act . . . provided that . . . the contractor shall agree in writing to comply with all the provisions of this Act.

The new policy of giving the Interstate Commerce Commission control over the rates of pay for air-mail transportation was embodied in Section 6 of the Act which provided that the Commission should have authority to fix the rates, after a hearing, and to change them from time to time. At least once in each calendar year the Commission was to review the rates that had been fixed for the holder of a contract "in order to be assured that no unreasonable profit is resulting or accruing therefrom." In fixing the rates to be paid the Commission was to take into consideration the amount of mail carried, "the facilities supplied by the carrier, and its revenue and profits from all sources," but after July 1, 1938, the aggregate cost of securing air-mail transportation is not to exceed the amount of anticipated revenue from air-mail postage.

The limitation of total air-mail payments to the amount of air-mail revenue will probably need to be repealed; at least, it is

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the view of the Interstate Commerce Commission as expressed in a report made to Congress July 7, 1936, and also in its annual report at the end of 1936, that, "unless a phenomenal increase occurs in the revenue from air mail postage by 1938, compensation measured by rates confined to such revenue would not enable the carriers to operate the present class of mail service, if it would permit them to operate at all."

Among the other provisions of the Act of 1934 were several prohibiting holders of air-mail contracts from having a financial interest directly or indirectly in any phase of the aviation industry, forbidding combinations of air-mail carriers, and stipulating that no person shall hold a contract for carrying mail upon more than one primary route nor upon more than two secondary routes in addition to the primary route for which a contract is held. The contracts for carrying air mail awarded under the Watres Act of 1930 having been cancelled, because the postmaster-general considered them to have been the result of collusion among the bidders, the Act of June 12, 1934, provided that:

Whosoever shall enter into any combination, understanding, agreement, or arrangement to prevent the making of any bid for any contract under this Act, to induce any other person not to bid for any such contract, or to deprive the United States Government in any way of the benefit of full and free competition in the awarding of any such contract, shall upon conviction thereof be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Provision was made in the Act of 1934 for the appointment by the President of a special commission of five men "to make a study and survey and to report to Congress not later than February 1, 1935, its recommendations of a broad policy covering all phases of aviation and the relation of the United States thereto." The report made by this Federal Aviation Commission (Senate Document No. 15, 74th Congress, 1st Session) covered the whole field of civil and military aviation with recommendations as to government aid and regulation. The report urged the establishment of an Air Commerce Commission to have jurisdiction over the Government's relation to aviation, and among the powers to be granted the Air Commerce Commission was that of fixing

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“the rates to be paid by the Post Office Department to air lines carrying the mail.” It was the opinion of the special Aviation Commission that, “The carriage of mail should be put on a commercial basis, with payments to lines within the amount received by the Post Office.” Instead of a policy of subsidizing air-line carriers by mail contracts, the Aviation Commission recommended that air-mail services be paid for on a cost basis and that “whatever additional sums are for the time being necessary to maintain and develop additional transport services shall be allocated specifically to that purpose by the government.” This recommendation has much to commend it. Mail contracts are not the best and most effective means of subsidizing air transport. Government aid given for the operation of air-transport lines should be such as will assist the air transportation industry as a whole. Moreover, government aid must be accompanied by government regulation.

The special Aviation Commission would have had Congress temporarily vest in the proposed Air Commerce Commission comprehensive power to aid and regulate air transportation and carriers, such temporary commission to be “subject to merger by executive order at any time with any other body of a similar nature having similar functions.” However, the President, in transmitting to Congress the report of the special Aviation Commission, having in mind the ultimate creation by Congress of an agency having regulatory jurisdiction over all kinds of transportation, wisely declined to concur in the recommendation and expressed the opinion that “a division of the Interstate Commerce Commission can well serve the needs of air transportation” regulation. The subject of Federal regulation of air transportation will be discussed in the following chapter.

The air-mail legislation contained in the Act of 1934 was amended in several particulars\*by the Air Mail Act approved August 14, 1935. Most of the amendment concerns the regulation of air-mail carriers by the postmaster-general and the Interstate Commerce Commission and will be considered in the following chapter. The amendments that affected the kind or amount of government aid to air carriers were as follows: The postmaster-general might extend an existing mail route 250, instead

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of 100, miles. The Act of 1934 provided for four transcontinental routes and for giving the eastern and western coastal routes the rank of primary routes, while the Act of 1935 stipulated that there should be not less than three transcontinental routes and that the two coastal routes need not be held to be primary routes. The amending act increased from 29,000 to 32,000 the mileage of routes over which air-mail contracts could be granted, and it was also provided that the annual aeroplane miles aided might be 45 million instead of 40 million. The Act of 1935 defined more specifically and somewhat increased the authority of the Interstate Commerce Commission over the rates of air-mail carriers, and thus over the aid given them. The rates for air-mail carriage for each of the routes—there were 33 domestic air-mail routes—were to be fixed by the Commission, after a hearing, and published, each carrier being free to apply for changes in the rates to meet altered conditions of service. Contracts that were in effect March 1, 1935, or that were made thereafter and which met the requirements of the Amended Act, might be continued indefinitely subject to termination by the Commission, after a hearing, and upon 60 days' notice. A carrier might be awarded contracts for one primary route and three (instead of two) secondary routes. In fixing the air-mail contract rates the Commission was not to take into account the carrier's losses from the unprofitable maintenance of non-mail schedules. While Congress did not give the Commission jurisdiction over air carriers, other than those having contracts for the transportation of mail, the Act of 1935 authorized the Commission to investigate alleged unfair practices on the part of competitors of air-mail carriers, and to order unfair competitive practices or services discontinued or appropriately restricted; thus the statute provided for what may prove to be valuable assistance to scheduled air-mail services.

### SUMMARY AND CONCLUSIONS

Air transportation is an industry that can be successfully and adequately developed, and be ultimately put upon a profitable and self-supporting basis, only by liberal public aid during a promotional period of considerable duration. Such public aid is

fully warranted by the social, economic, and military importance of efficient aviation services. Inasmuch as air transportation services are mostly interstate in scope, and the benefits derived therefrom are distinctly national, the major share of the public assistance to aëronautics and air transportation and commerce in the United States should be given by the Federal Government.

Government aid to aviation in the United States, as described in the foregoing discussion, has been of two general categories. The first category includes the several kinds of assistance that make possible the operation of aëroplanes and their increased size, speed, and safety. The Federal Government, through several agencies, has greatly assisted in the scientific development of aëronautics; and, by providing the country with a general system of lighted and otherwise equipped airways, has made possible the large use that is made of aëroplanes, partly for private flying, but more for the performance of organized passenger, mail, and express transportation services. The claim made in the recent report by Senator Copeland for the Committee on Commerce of the United States Senate, that, "American commercial aëronautics is supreme throughout the world when judged by any of the accepted standards of appraisal," may be one that would not be accepted by foreign critics as strictly accurate; but the rapid progress now being made in the technical development of the aëroplane and the volume of air travel and transportation is an unmistakable indication of the success of the Government's policy of aiding aëronautics and providing airways.

The other kind of government assistance to aviation in the United States has been, and now is, the granting of air-mail subsidies, or the payment to air-line carriers for the transportation of air mail of amounts much in excess of the additional operating costs incurred in performing the service. The facts that have been presented show that such subsidies were especially large from 1928 to 1934. At the present time, it is the air-mail contracts that make possible the large, increasing, and well-organized transportation services being rendered by the air-line carriers in the United States. Moreover, the Interstate Commerce Commission is doubtless correct in its opinion that the continued success and development of American air-lines will require the payment,

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beyond the year 1938, to such carriers for the transportation of air mail of amounts greater than the Government's receipts from air-mail postage. It is apparently necessary either to continue the present policy of aiding air transportation by air-mail subsidies, or by some other plan of subsidy.

Whether the payments for air-mail transportation should be put upon a cost basis in 1938, and the essential air transportation subsidies of the Government should thereafter, for such period and in such amount as may be necessary, be upon some other basis is a question that may well be given careful consideration. Ocean-mail subsidies were not found to be an effective means of building up a well-balanced, progressive, and efficient American merchant marine in the foreign trade. For the ineffective ocean-mail subsidies, Congress has, by the Act of 1936, substituted construction and operating subsidies that are intended to be helpful to the American construction and ownership of vessels and their operation in the several services and over the various routes of the foreign trade of the United States. It is the American merchant marine as a whole that is registered for the foreign trade that Congress is now seeking to aid and develop by means of government subsidies, and not only such part thereof as may be of service in carrying ocean mail. It is possible that general subsidies to air-line carriers for performing specified passenger, express, and mail services over designated airways may be more effective than the present air-mail subsidies in furthering the development of air transportation and commerce. The aim of government aid should be the building up of a well-balanced, coördinated, country-wide, and progressively efficient system of air transportation. The present air-mail subsidies are producing good results, and should be continued unless and until there is found to be some yet more effective plan of government assistance.

## REFERENCES

- Air Commerce Act, approved May 20, 1926 (Public No. 254, 69th Congress) ; Amendment thereto by Act approved June 19, 1934 (Public No. 418, 73rd Congress).  
*Aircraft Year Book*. Consult especially the 18th Annual Report, 1936, which contains on pp. 505-509 the Air Mail Act of June 12, 1934, as

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*Aviation*, a monthly publication. The issue for July, 1934, pp. 206-207, contains the text of the Air Mail Act of June 12, 1934.

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## CHAPTER XXV

### FEDERAL REGULATION OF AIR TRANSPORTATION

TRANSPORTATION facilities and service, whether they be those of carriers by air or of carriers by railroads, highways, or waterways, are regulated to accomplish at least two general purposes, one of which is to make them safer for the carriers who serve and for the public served, while another is to maintain equitable relations between the carriers regulated and between such carriers and the public they serve. The Government with the coöperation of the carriers concerned has been especially successful in increasing the safety of the services of the railroads; and nearly as much has been accomplished in promoting the safety of transportation by water. The more difficult task of making the highways safe for those who use them and for the public in general has not been satisfactorily solved. The record of highway accidents, injuries, and fatalities is an appalling one, in spite of the government requirements concerning the vehicles that may be operated, the qualifications of drivers, and the traffic regulations to be observed. Safety conditions in highway travel and traffic must somehow be improved, but just how it can be effectively done is not evident.

The necessity of adopting all practicable measures for making aëroplanes as safe and reliable as possible, of requiring those who operate them to have adequate qualifications, of doing what can be done to provide well equipped airfields, airways, and landing fields, and of making the radio and other achievements of scientific discovery the servants of safety of flight, has been so obvious, and the attainable results have been so great, that remarkable progress has been made in reducing the risks in air travel and transportation. The impossible has not been accomplished. Neither aëroplanes nor aviators are infallible. Accidents still happen, but the number of accidents to aëroplanes operated in



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regular air-line services is small, and can be further reduced by the future development of the science of aëronautics. Private operations account for most aëroplane accidents and consequent casualties, and it is the enforcement of safety regulations concerning such aëroplanes and their operators that the states and the Federal Government find most difficult of accomplishment.

Having discussed, in Chapter XXIII, state and local aid and regulation of air transportation, and having in the succeeding chapter, dealt with Federal aid to aviation operation and development, it remains to present the facts as to the present regulation of air transportation and carriers by the Federal Government and to consider whether the principles and policy of government regulation that have been applied to railroad and highway transportation should be applied to carriers by air and to the services they render.

### FEDERAL REGULATION OF AËRONAUTICS UNDER THE AIR COMMERCE ACT OF 1926

It is the Air Commerce Act approved May 20, 1926, as slightly amended, that provides for the aid and regulation of air transportation by the Federal Government. The provisions concerning government aid were stated in the preceding chapter. The regulatory powers over aircraft and carriers conferred upon the Secretary of Commerce by that act provided for:

1. The registration of aircraft owned by citizens of the United States or by the Federal, state, or local governments; and the Secretary may also grant limited registration to aircraft owned by aliens—such aircraft not to engage in interstate or intrastate commerce.

2. The rating of aircraft (and parachutes) as to their air-worthiness, and their re-rating from time to time. The Secretary may, in the exercise of this important power, require full particulars as to design and materials and methods of construction of aëroplanes, and may require "the periodic examination of aircraft in service and reports upon such examination by officers or employees of the Department of Commerce or by properly qualified private persons."

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3. The periodic examination and rating of airmen as to their qualifications.

4. The examination and rating of air navigation facilities and civilian schools giving instruction in flying. Air-lines engaged in interstate or foreign commerce are to be examined and rated and minimum safety standards are to be fixed for their operation.

5. "Air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitude of flight and rules for the prevention of collisions."

6. "The issuance and expiration, and for the suspension and revocation, of registration, aircraft, airline, and airmen certificates." If an application for a certificate is denied or a certificate is suspended the applicant or holder may make application, within 20 days, for a hearing, and the Secretary of Commerce must, within 20 days after receiving such a request, arrange for a public hearing, giving the applicant or holder 10 days' notice of the hearing. The statute, as amended, provides that, "The Secretary of Commerce shall not deny any application for an airline certificate or revoke or suspend any airline certificate, except for failure of the airline to comply with safety standards applicable to the operation thereof prescribed by the Secretary."

The Air Commerce Act of 1926 further contains a number of regulatory provisions that would naturally be a part of such legislation. The Secretary of War may designate air routes as military airways and prescribe rules and regulations for their use. The statute provides that foreign military aircraft "shall not be navigated in the United States, except in accordance with an authorization granted by the Secretary of State." Civilian foreign aircraft may navigate in the United States only when authorized by the Secretary of Commerce, and such aircraft and their airmen shall be subject to the same requirements as are American aircraft and airmen, except that the Secretary of Commerce may authorize an aircraft registered under the laws of a foreign country to navigate in the United States without being subject to regulations other than air-traffic rules, but such foreign aircraft shall not engage in interstate or intrastate air commerce. The Secretary of the Treasury is authorized by the statute to designate ports of entry for civil aircraft and for merchandise

brought into the United States by such aircraft, and to enforce the customs regulations and health laws at such ports; and the Secretary of Commerce may "provide for the application to civil aircraft of the laws and regulations relating to the entry and clearance of vessels to such extent and upon such conditions as he deems necessary." Moreover, the Secretary of Labor is authorized "to designate any of the ports of entry for civil aircraft as ports of entry for aliens arriving by aircraft . . . [and] by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such conditions as he deems necessary."

The regulation of air transportation facilities and services has to do mainly with safety matters, the administration of the regulatory statute being vested in the Secretary of Commerce. Provision was made for the appointment of an additional Assistant Secretary of Commerce for Air Commerce. As has been explained in the preceding chapter, the administration of the Air Commerce Act was made the task of an Aëronautic Branch of the Department of Commerce with a Director and with an appropriate number of sections and divisions. The title of the Aëronautics Branch was, on the first of July, 1934, changed to the Bureau of Air Commerce. The Assistant Secretary in Charge of Air Commerce also has jurisdiction at the present time over the relation of the Department of Commerce to transportation in general and he has the title of Assistant Secretary for Transportation.

The Bureau of Air Commerce is supplementing its valuable aid to the science and development of aëronautics by its regulation of air-transportation facilities and of the standards required of those who operate the facilities. The high estimate placed by Senator Royal S. Copeland, in a report made by the Senate Committee on Commerce, upon the results that have been achieved in the Federal aid and regulation of aëronautics was referred to in the preceding chapter. Possibly it was claiming too much to assert that "American aëronautics is supreme throughout the world when judged by any of the accepted standards of appraisal." The unfortunate number of serious accidents during the latter part of 1936 and also in 1937 indicates the need of maximum efficiency

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in the administration of the regulatory provisions of the Air Commerce Act. In his report to the Senate, Senator Copeland states that, "Your committee is of the opinion that a sound solution of our aeronautical difficulties lies first in the revival of the office of the Assistant Secretary of Commerce for Air and to assign to that official no extraneous duties." It was in 1933 that the duties of the Assistant Secretary of Commerce for Air were enlarged to those of Assistant Secretary for Transportation. It is recommended that the action then taken be rescinded. Reference is also made in the Copeland Report to "many complaints and rumblings against the administration of civil aeronautics by the Department of Commerce"; and the opinion is expressed that the present administrative organization should be so improved as to provide for more "intelligent planning and forethought continuously devoted to the present or future needs of civil aeronautics."

Whether the general regulation of interstate air transportation and carriers should be exercised by the Federal Government, whether the principles of government regulation now followed in the regulation of carriers by rail and by highway should be applied, with appropriate modification of statutory provisions, to carriers by air, are questions that are receiving careful consideration at the present time. The proposal that air transportation should be regulated as are other kinds of transportation has the support of disinterested authorities of high standing, and also of the large air-line carriers. The question concerning which there is most definite difference of opinion is whether such regulation should include authority over the rates and fares of air-line carriers. As to the desirability of requiring interstate air-line carriers to obtain from the Government certificates of convenience and necessity after showing that their proposed services are needed and will be of benefit to the public there is no apparent difference of opinion.

The views expressed by the Coördinator of Transportation in 1934 as to the desirable scope of the Federal regulation of air transportation and as to the benefit that would result therefrom were that:

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If Federal regulation along lines other than the promotion of safety is to be considered, it should embrace three major subjects: The administration of payments for the carriage of the mail, the administration of any subsidies which Congress may authorize in the future, and control of entrance into the industry and of extension of lines. To secure effective results in these particulars it would probably be necessary also to establish control of accounting, capitalization and mergers or acquisitions of control. Control of rates need not be contemplated at least at present.

It is believed that regulation of the kind indicated would accomplish much towards straightening out and stabilizing the industry, making it thereby a more efficient and responsible public servant.

It was the opinion of Mr. Joseph B. Eastman, who was the Coordinator of Transportation, that "regulation, when undertaken, should be placed in the hands of the Interstate Commerce Commission," it being his opinion that the Commission "could perform the work expertly and at small additional cost," and that "the addition (to the Commission) of this function would represent a logical rounding out of the program of regulation of the several agencies of transportation."

After having had two years' experience in regulating the payments made to air-line carriers for transporting air mail, under the terms of the Air Mail Act of 1934, as amended in 1935, the Interstate Commerce Commission in its annual report for 1936, calls attention, as has been noted in the preceding chapter, to the need of amending those laws, and then states that:

As an alternative to further amendment of the existing acts, the drafting of an entirely new law for comprehensive regulation of interstate air transportation similar in scope to Parts I and II of the Interstate Commerce Act governing the regulation of interstate railway and highway carriers appears, therefore, to be preferable. While the present scheduled air-transport service began as an exclusive mail service, the transportation of persons and property has grown to such volume and extent in recent years that transportation by air has become an integral part of the transport system of the nation and should be regulated as such.

Several references have been made to the report made in February, 1937, by Senator Royal S. Copeland and submitted to the Senate by the Committee on Commerce. In this report an opinion is expressed as to two important questions that must be decided in

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legislating for the Federal regulation of interstate air transportation. One question is whether the regulatory authority now exercised by the Department of Commerce over aircraft equipment, airway facilities, and the qualifications of airmen should remain with the department or should be transferred to the agency that may be vested with the general regulation of interstate air transportation.

The Secretary of Commerce is charged with two closely related, and largely interwoven, duties of aiding and promoting aviation and the science of aëronautics, and of fixing and enforcing the standards that must be met, in the interest of safety, in the construction and operation of aircraft and air-transportation facilities. The Copeland Report does not advocate the present general concentration of Federal authority over air carriers and their facilities in a single agency. "Should it seem wise," the report states, "to turn over to the Interstate Commerce Commission certain functions, there should be left to the Department of Commerce responsibility for safety." Whether the regulation of safety should remain with the Department of Commerce or should be transferred to the agency that may be charged with the duty of general regulation of air transportation and carriers may be a debatable one. However, it would seem to be practicable to leave the regulation of safety matters with the authority that is concerned with the scientific development of aviation, and to vest the general regulation of air transportation and carriers in another authority. The Department of Commerce is doing its work of safety regulation and aviation promotion very well, and there seems to be no necessity for transferring that task to another agency at the present time.

The larger question that should be decided at the present time is whether air transportation and carriers should be regulated as are other kinds of transportation and carriers, and, if so, whether such regulation should be by the Interstate Commerce Commission or by some other agency. The Copeland Report, being concerned primarily with the discussion of government regulation of aëronautics in the interest of safety of operation and the technical development of the art of aviation, does not discuss the problems of the general regulation of air transportation; but

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leaves that question to be dealt with in the future. "The problem," the report states, "will soon be a major one for national consideration."

While those who believe that the time has already come to apply to transportation by air the same principles and the same general policy of Federal regulation as are now applied to railroad and highway transportation may feel that the Copeland Report should have taken a more definite position regarding such regulation of air transportation, the report is to be commended for not favoring the creation of a new regulatory agency of the Government, such as a Federal air commerce commission. In the discussion of air-mail legislation reference was made to the report of the special Federal Aviation Commission for the appointment of which provision was made by the Air Mail Act of June 12, 1934. The Commission was a temporary one created to make an "immediate study and survey, and to report to Congress not later than February 1, 1935, its recommendations of a board policy covering all phases of aviation and the relation of the United States thereto." The report was duly made and was transmitted to Congress January 31, 1935, by the President with a brief message in which he stated that, "The Commission . . . recommends the creation of a temporary air commerce commission. In this recommendation I am unable to concur. I believe we should avoid the multiplication of separate regulatory agencies in the field of transportation . . . a division of the Interstate Commerce Commission can well serve the needs of air transportation." The position taken by the President was that "it becomes more and more apparent that the Government of the United States should bring about a consolidation of its methods of supervision over all forms of transportation."

The general policy of air-transportation regulation recommended by the former Coördinator of Transportation, by the Interstate Commerce Commission, and by the President may well be adopted. The factors that make the general regulation of other forms and agencies of transportation desirable and of benefit both to the carriers and the public apply to the general regulation of air transportation and carriers. A bill to provide for such regulation is now pending in the Senate. It is to be hoped that

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Congress may give the measure careful consideration and may act without unnecessary delay. It will be well to summarize the main provisions of the proposed congressional legislation.

### PROPOSED FEDERAL REGULATION OF AIR TRANSPORTATION

The bill just referred to (Senate 2, 75th Congress, 1st Session) in revised form was introduced by Senator Patrick A. McCarran of Nevada, March 3, 1937, and was referred to the Committee on Interstate Commerce of the Senate. It proposed to add a Part III to the Interstate Commerce Act "by providing for the regulation of the transportation of passengers and property by aircraft in interstate commerce," in manner and scope similar to the regulation of railroads by Part I, and of motor carriers by Part II, of the present act. The purpose of the proposed legislation and the policy to be followed in accomplishing that aim are succinctly and hopefully set forth as follows at the beginning of the draft of the bill:

Sec. 302. (a) It is hereby declared to be the policy of Congress to regulate transportation by air carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation among such carriers in the public interest; to promote adequate, economical, and efficient service by air carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive practices; to improve relations between, and coördinate transportation by and regulation of, air carriers, and other carriers; and by the regulation specified herein and by providing for the transportation of mail by aircraft, to preserve and further develop a system of transportation by aircraft in interstate, overseas, and foreign commerce, properly adapted to the needs of the commerce of the United States, of the Postal Service, and of the national defense.

In the same section, it is provided that the legislation shall "apply to the transportation by air carriers of passengers or property in interstate, overseas, and foreign commerce; and to the transportation of mail by aircraft; and the regulation of all such transportation is hereby vested in the Interstate Commerce Commission." Thus if the proposed measure should become a statute it would repeal (as specified in Section 319 of the bill)



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the existing air mail legislation—the Air Mail Acts of 1928, 1929, 1934, 1935—and would substitute therefor the provisions of the proposed Air Carrier Act, 1937. The proposed legislation, however, would not terminate the granting of air-mail subsidies for the promotion of air transportation; on the contrary, the bill provides that, in fixing the rates of pay to air carriers for carrying mail, the Commission “shall give due consideration . . . to the need of each such carrier for compensation for the transportation of mail by aircraft sufficient to insure the performance of such service and, together with all other revenue of the carrier, to enable the carrier, under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent, and of the character and quality, required in the public interest.”

The McCarran Bill wisely provides (Section 320) that, “Nothing herein contained shall be construed in any way to impair or affect the jurisdiction exercised by the Secretary of Commerce relative to the safety of operation of aircraft,” but it would subject the business of interstate air transportation to comprehensive regulation by the Interstate Commerce Commission. In the exercise of its authority, the Commission is “to promote the development of efficient interstate, overseas, and foreign air transportation . . . by prescribing . . . standards respecting the character and quality of service to be rendered,” to keep itself informed as to the organization and management of the business of air carriers, and “to transmit to Congress from time to time such recommendations as to additional legislation as the Commission may deem necessary.”

The proposed regulation would begin, as it logically should begin, by requiring each air carrier to obtain from the Commission a certificate of public convenience and necessity before engaging “in interstate, overseas, or foreign air transportation or in any transportation of mail by aircraft,” there being the usual grandfather clause allowing a carrier in operation upon the enactment of the law to file an application for a certificate within 120 days and to continue in operation until such application has been acted upon by the Commission. When an application is filed, the Commission shall give notice thereof to the postmaster-general and

the public, and if it is an application for a certificate authorizing foreign air transportation notice shall be given to the departments of State, Treasury, Post Office, and Commerce. The Commission shall hold a public hearing before acting upon an application. A certificate may be granted for a limited or an indefinite period, and may be revoked if the holder of the certificate does not comply with lawful orders and regulations issued by the Commission. Moreover, a certificate may be suspended by the Commission, "to the extent required by any order of the Secretary of Commerce relative to the safety of operation of aircraft, issued pursuant to the Air Commerce Act of 1926 as amended."

The proposed act would give the Commission the necessary authority over the accounts and records of air carriers and over the reports to be made. Likewise, the Commission would be given complete and essential jurisdiction over the tariffs and charges of air carriers. All carriers engaged in interstate air transportation would be required to print, file with the Commission, and keep open to public inspection their classifications and tariffs of charges, and no change may be made in rates, fares, or charges, or in classification, except upon 30 days' notice. The Commission may upon complaint, or upon its own initiative, investigate an existing or proposed rate, fare, classification, or practice; and, if the same is found to be unreasonable, the Commission may "determine and prescribe the lawful rate, fare or charge, or the maximum or minimum, or the maximum and minimum rate, fare or charge thereafter to be observed, or lawful classification, rule, regulation, or practice thereafter to be made effective." The Commission may also fix "the divisions of joint rates, fares or charges applicable to interstate air transportation, or interstate transportation in conjunction with other common carriers." If the Commission suspends a proposed tariff, the suspension shall be for a period of 90 days; and, if the hearings upon the tariff have not been completed within that time, the period may be extended "but not for a longer period in the aggregate than 180 days beyond the time when it [the tariff] would otherwise go into effect." If the Commission has not reached a decision and issued an order within this extended period, the tariff goes into effect, until the Commission has acted.

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In view of the importance of air-mail payments as a means of developing air transportation, the provisions as to air-mail contracts contained in the proposed legislation are of especial significance. As has been stated the present air-mail legislation would be repealed, with the proviso that existing air-mail contracts, made under the terms of the Act of June 12, 1934, shall continue in force until the holders of the contracts have obtained new certificates under the proposed statute. The Commission is given complete jurisdiction over payments for the carriage of air mail, and is given ample discretionary authority. The Commission may act upon its own initiative or upon petition of the postmaster-general or an air carrier, and is given authority

(1) To fix and determine from time to time, and after notice and hearing, the fair and reasonable rates and compensation for the transportation of mail by aircraft, and the facilities devoted to and services connected therewith, by each holder of a certificate authorizing the transportation of mail by aircraft; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers.

The adoption of the McCarran Bill would remove the limitations placed upon the Commission in fixing air-mail payments under the Act of June 12, 1934, and the Commission would be authorized and directed, in determining the compensation for the carriage of air mail, to consider the need of the carrier for revenue from all sources sufficient "to enable the carrier, under honest, economical and efficient management, to maintain and continue the development of air transportation." The enactment of the proposed legislation would make possible the continuance of air-mail subsidies beyond July 1, 1938, when, under the Act of 1934, air-mail payments are not to exceed the anticipated revenues from air-mail postage.

The regulation of the consolidation, merger, and acquisition of the control of interstate air carriers is provided for by the proposed legislation, the provisions being similar to those applied by the Act of June 16, 1933, to railroad consolidations and mergers, and to non-railroad holding companies, and to those applied to motor carriers and holding companies by the Motor Carrier Act

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of August 9, 1935. Agreements of air carriers with each other or with other carriers for the pooling of traffic or earnings may be made if and when approved by the Commission, as also may agreements made for regulating destructive or wasteful competition or for regulating the character of service. Moreover, the Commission upon complaint of an interested party or upon its own motion may after a hearing "order an air carrier [to] cease and desist from using unfair methods of competition in interstate, overseas, or foreign commerce."

The issuance of securities of companies about to engage in air transportation and of companies authorized "to acquire control of any air carrier or two or more air carriers" is fully regulated. The provisions of Section 20a of Part I of the Interstate Commerce Act applying to the regulation of the financing of railroads are to be made applicable to carriers by air in interstate and foreign commerce. The proposed regulation of the issuance of securities by air carriers is, thus, more complete than the regulation of the security issues of motor carriers subject to the Motor Carrier Act of 1935.

The proposed statute sets forth the penalties that may be imposed for the violation of the act or of a lawful order or regulation; and the final section of the bill stipulates that it shall be in force from and after its passage, the Commission being given authority to postpone, for a period not exceeding two months, the taking effect of any provision of the statute.

It is to be hoped that Congress will, during 1938 accomplish the enactment of legislation for the regulation of air transportation. It is not to be assumed that when Congress acts the McCarran Bill above outlined will be adopted without numerous amendments as to details. However, it is probable that the general principles and the main features of the bill as outlined will be incorporated in any statute that may be enacted. By such action Congress will apply to air carriers and transportation the principles and provisions of regulation that have been applied to railroad and motor carriers.

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## THE INTERNATIONAL AIR CODE

All forms of organized transportation are international in scope, but *aéronautics* is the most international of all. Indeed, air-line services have become intercontinental. They connect North and South America with each other, Europe with all other continents; and recently the Pacific Ocean has been spanned by a regular air-line service between the United States and the Orient. In the regulation of aviation the jurisdiction of each country is limited to its own territory, but within its boundary each country has sovereign authority over foreign as well as national aircraft and their operation and use. For the regulation of flying and air commerce, international agreements are required. The general provisions of such agreements are embodied in an international air code that dates from 1919.

At the close of the World War an international convention on air navigation was called together by the Premier of France. The convention was composed of two delegates from the United States, and a like number from the British Empire, from France, Italy, and Japan; while Brazil, Cuba, Greece, Portugal, Romania, and Serbia were each represented by one delegate. The convention became the *Aéronautical Commission* that advised the Supreme Council of the Peace Conference on matters pertaining to aviation. The convention drafted an international air code, which was based upon the sovereignty of each country and which was submitted to each nation for adoption. The main provisions of the code were that:

1. Each nation would give the aviators of other contracting countries the right of freedom of innocent passage, in times of peace, over its territory, except over prohibited areas.
2. There was to be international registration of aircraft and aviators as a prerequisite of international flying.
3. Identification insignia were to be displayed upon the *aéroplanes*.
4. The certificates of aircraft crews were to be validated by each nation.
5. Certificates covering wireless communication by or with planes were to be validated by each nation.
6. Each country was to require certificates of airworthiness for planes and of competency for pilots.

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7. Standard medical requirements were recognized to be essential for all countries.

8. Each contracting country was given the right to make reservations and restrictions to be respected by others with respect to its own craft and aviators.

9. International airways were to be established by agreement of interested countries.

10. International agreements were to include provisions governing landing, departure, and non-stop flight over the territory of contracting countries.

11. Each plane in an international flight was to carry a list of passengers and of cargo, and a log-book.

12. The carriage of arms, ammunition, and explosives, as well as other things of danger to national safety, were to be prohibited.

13. The carriage of photographic apparatus and the making of photographs were to be limited by regulations.

14. Military aircraft were to be forbidden to fly over foreign territory.

The Air Commerce Act of 1926, whose main provisions have been stated in the foregoing discussion, contains the general requirements to be met by foreign aircraft in the United States. The Secretary of Commerce may authorize "aircraft not a part of the armed forces of a foreign nation" to be navigated in the United States, but if so authorized the foreign craft are ordinarily subject to the same regulatory provisions as are domestic aircraft; but the statute provides that:

If a foreign nation grants a similar provision in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the laws of a foreign nation and not a part of the armed forces thereof to be navigated in the United States, and may by regulation exempt such aircraft, and/or airmen serving in connection therewith, from the requirement of Section 3 [pertaining to registration, rating etc.], other than air traffic rules; but no foreign aircraft shall engage in interstate or intrastate air commerce.

The last provision in the paragraph just quoted is of special significance. Airways connecting the United States with countries to the North and South are much used for the international transportation of passengers, express, and mail, but the United States reserves domestic air commerce strictly to American carriers.

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Subject to such restriction, there is a large measure of international comity regarding international aviation, particularly between the United States and Canada, their agreement with each other having been revised in 1936.

In the above list of provisions of the International Air Code, the seventh one refers to the recognized necessity, in the interest of public health, to have standard medical requirements to be met in international aviation. To make affective this phase of international regulation of aviation an International Sanitary Convention for Aërial Navigation was completed and submitted at The Hague in 1933 for the signature or ratification of the nations of the world. The Convention was ratified by the United States in June, 1935. By the close of that year, 35 nations had ratified or were adhering to the Convention.

The Department of Commerce in promoting the development of aviation concerns itself with the extension of the scope of international agreements. The Bureau of Air Commerce states, in the 1936 annual report of the Department, that "Active participation in the establishment and maintenance of foreign agreements for the reciprocal recognition of airworthiness certificates has continued [and that] at the end of the fiscal year, negotiations with Australia, looking to an arrangement for licensing American built aircraft in that country, were nearing completion." This indicates that air transportation development and regulation, as one would expect, are being dealt with more and more as matters of international concern. Aviation and the radio are making one community of the many nations of the world. Can we enjoy the blessings of civil aviation, and escape the horrors of military aviation?

### SUMMARY AND CONCLUSIONS

The Federal Government has made adequate and satisfactory provision for the issuance and enforcement of safety regulations applying to aëroplane equipment and its operation. The Department of Commerce, functioning through its Bureau of Air Commerce, is to be commended for what has been accomplished and for what is being done. However, the rapid development of aviation

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and organized air transportation has brought the industry to the point where its regulation should again be made the sole task of an Assistant Secretary of Commerce for Air. The recommendation made in the Copeland Report of 1937 is one that may well be adopted by reconsidering and changing the action that was taken in 1933, making the regulation of air commerce a part of the duties of an Assistant Secretary of Commerce for Transportation.

The general regulation of the business of air carriers and transportation should begin as soon as practicable. The recommendations of the former Coördinator of Transportation, and of the Interstate Commerce Commission and the President, should be embodied by Congress in legislation that will apply to carriers by air, and to their services, charges, finances, and intercorporate relations, the general principles that have long been successfully and beneficially applied to railroad carriers and are now being carried out in administering the provisions of the Motor Carrier Act of 1935. The present Interstate Commerce Act, now composed of two parts, should be enlarged by adding two more parts, one for the regulation of domestic carriers by water, another for the regulation of air carriers.

The McCarran Bill that was introduced into the Senate in March, 1937, would apply to the regulation of air carriers and commerce the principles that are being applied to the regulation of railroad and motor carriers and transportation. That bill, with such changes in detail as its thorough discussion may indicate to be desirable, may well be given a statutory status. When such action has been taken and similar legislation has been enacted for the regulation of domestic carriers by water, government regulation can be made effective in furthering the development of a well-balanced and economical general national system of transportation.

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PART VII

THE GOAL AND ITS ATTAINMENT



## CHAPTER XXVI

### A NATIONAL TRANSPORTATION POLICY

#### THE DEVELOPMENT OF GOVERNMENT REGULATION OF TRANSPORTATION

FOR more than a half a century the people of the United States have concerned themselves with the development and regulation of transportation. Previous to that period many of the state governments gave public aid to the construction of railroads and especially of waterways. When the railroads had established their superiority over the turnpike wagon roads and the canals and shallow rivers as carriers of freight, the states suspended their highway and waterway programs and turned to the corporations that were building and operating railroads to provide other than local transportation. The states gave some assistance to the earlier railroad companies; and the Federal Government, from 1850 to 1880, gave large public assistance to the corporations that constructed the railroads across the wide unsettled public domain that separated the central part of the country from the Pacific seaboard. The so-called transcontinental railroads were aided by the United States for the purpose of giving political, economic, and social unity to the Mississippi Valley, the wide mountain region and the transmontane Pacific seaboard section of the country.

The development of the railroads, and their operation by rival companies whose unrestrained ambitions led them to engage in ruthless competition, soon gave rise to abuses that called for correction by government regulation. The public found that the unrestricted competition of unregulated railroad companies gave rise to unfair discriminations in rates and services, and that the public interests were being sacrificed, not only by unjust discriminations among those served, but also because competitive warfare among the carriers weakened them and prevented them from improving their services.

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With the hope of eliminating railway abuses by prohibiting carriers from engaging in harmful practices, the government regulation of the railroads was begun by some of the states about 1870, and by the United States in 1887. The task of effective government regulation of railroads proved to be a difficult one that took several decades to accomplish. Railroad regulation has passed through an early period characterized by legislation mainly corrective and punitive in purpose to a period that began about 1920, during which government regulation has not only had the negative aim of correcting abuses but also, and mainly, the positive constructive purpose (as stated in the present rule of rate-making in the Interstate Commerce Act) of furthering the development of "adequate and efficient railway transportation at the lowest cost consistent with the furnishing of such service," and of giving consideration "to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management, to provide such service." The attainment of this objective of constructive and helpful regulation has not yet been fully realized. Several things still need to be done. Reference to some of them will be made in the following discussion.

The present policy of the states towards the development of highways and the regulation of their use had its beginnings during the eighteen-nineties when the states began the creation of state highway systems. Even as late as that time the roads were used almost entirely for local transportation, but the automobile, by its rapid technical improvement and consequent ever-increasing use for travel and traffic during the decades that have followed 1900, has made it necessary for the states, latterly with aid of the Federal Government, to create a country-wide system of improved highways and to develop a policy of government regulation of motor transportation and carriers. This regulatory policy is still in a state of evolution, and will be for some time to come; but, as a result of the enactment of the comprehensive United States Motor Carrier Act of 1935, the evolutionary process has been accelerated.

The next major forward movement towards a well-balanced

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national transportation policy will be taken when provision is made for the more adequate regulation of transportation and carriers by water. General public approval of the adoption of a policy of applying to carriers by water government regulation, like in principle and scope to the regulation to which carriers by rail and road have been and are being subjected, will be granted only as a result of a period of education.

As has been stated in a previous connection, the public has a different feeling towards waterways and their use than it has towards other transportation facilities and their users. The waterways were nature's ways that were in existence before other ways were constructed. The waterways, including inland waterways as well as those provided by the ocean, are thought of as existing for the free use of the public, and they have also been regarded as an important safeguard of the public against unfair treatment by carriers upon landways. This psychological feeling and this attitude of the public have not been altogether changed, although present conditions are entirely different from those of a century ago. Waterways, especially inland waterways, are now being made available for use by present-day craft, by large expenditures of public funds for their improvement or construction and for their maintenance and operation. Those who really benefit from the free use of the waterways constitute only a small part of the public that is taxed to create and maintain the waterways. Moreover, on some inland waterways almost exclusively, and on others to a large extent, it is the traffic of private and industrial carriers, not that of the public-serving common carriers, that uses the waterways. Furthermore, it is no longer the free waterways, but effective government regulation, that safeguards the public against unfair treatment by carriers by rail and road. The waterways have their place in a national system of transportation. It is not the place they had 100 or 50 years ago. One of the results of the comprehensive regulation of all carriers will be to make it possible for each agency to perform the service it can render most efficiently and economically. "

The present movement for congressional legislation for the regulation of transportation by water was given a good start by

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the Coördinator of Transportation during the three years that the office of Coördinator had statutory existence. A well-prepared bill was drafted that was introduced in the Senate and House of Representatives during the 74th Congress (1935-1936). The bill was reintroduced during the first session of the 75th Congress, and in March, 1937, hearings upon the proposed legislation were held by the Committee on Merchant Marine and Fisheries of the House of Representatives. In Chapter XIX of this volume, a summary has been presented of the main provisions of the latest form of the proposed legislation. It is to be hoped that the question of the adequate Federal regulation of transportation by water will be kept before Congress and the public until appropriate legislation has been enacted.

The events of the World War emphasized the military importance of aviation; and, within a short time after the war, aviation was recognized as being capable of rendering valuable social and commercial services. The states and the Federal Government have brought into existence air terminals and airways that have made possible a country-wide air-transportation service. By scientific research and by a careful system of supervision, inspection, and licensing, air transportation has been made increasingly reliable and safe. The regulation of air carriers by the states and the Federal Government has thus far dealt mainly with rules and requirements for the promotion of safety of flight and for the protection of the personal and property rights of the public. The Government has not yet taken up the regulation of the services and business of air transportation and carriers. Carriers may engage in business, without obtaining a certificate certifying that their additional services are needed. The competitive relations of the carriers are not regulated, nor are the relations of the carriers with the public for whom they render passenger and other transportation services. General government regulation of air transportation and carriers embodying, in form appropriate to the industry, the principles that have been applied to the regulation of railroad and highway transportation will be of benefit to the air carriers and also to the public they serve.



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## THE GENERAL OBJECTIVES TO BE ATTAINED

In reaching a decision as to what should be the national transportation policy of the United States, the first question to be answered is whether the goal to be attained, either immediately or ultimately, is government ownership and operation of transportation facilities, or whether the end sought is the continuance of private ownership and enterprise subject to adequate and effective government regulation. For reasons that have been set forth at the beginning of this treatise, it is believed that it will be in the public interest for the United States to adhere to private ownership and operation, to encourage, rather than to prevent, the exercise of private business initiative, so far as possible, in the development and operation of transportation facilities. The rules of the game, prescribed and enforced by government regulation, should be such as will protect the public, will establish coöperative relations between the several agencies of transportation, and will enable each carrier and each class of carriers to render service with increasing efficiency and economy. Such rules are not easily formulated and carried out. The government regulation of transportation is a difficult task, but not an impossible one. Much has been accomplished, real progress is now being made, and past experience points out the path for the future.

What are the objectives to be attained by the comprehensive government regulation of transportation and carriers? Throughout this treatise emphasis has been placed upon the importance of regarding the several transportation agencies as parts of a coördinated national transportation system. One result to be obtained by the Government in dealing with the several kinds of carriers is to bring them into the best relation to each other, to make them complementary as well as competitive parts of a transportation system—each agency performing the service it can render most economically and efficiently. To bring about such a coördination of transportation agencies and facilities requires the adoption and carrying out of an appropriate policy of government regulation. There must be a national transportation policy concerning the government regulation of each class of carriers,

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and of their relations with each other as component parts of a coördinated system.

### OBJECTIVES YET TO BE ATTAINED BY GOVERNMENT REGULATION OF RAILROADS

As the result of legislation enacted during a period of more than a half century, the railroads are more comprehensively regulated than is any other transportation agency. There are, however, certain objectives yet to be attained—results that can be secured by modifying the present policy of the Government without increasing the total amount of regulation. Until the World War, and, as far as regulatory legislation was concerned, until the adoption of the Transportation Act of 1920, the policy of the Government was to keep competing railroads from combining. Emphasis was placed upon preventing the restraint of competition rather than upon furthering the coöperative activities of the carriers subject to regulation as regards services and charges. Under the Act of 1920, the government sought to further the grouping or consolidation of the railroads into a limited number of systems, but the result has not been what was expected. The plan of grouping provided by the Act of 1920 was one that tended to hinder rather than hasten consolidation by voluntary action of the carriers, and, after 1929, economic and financial conditions prevented the carrying out of consolidation plans. Congress sought to improve the railroad situation that had been created by the business depression by adopting the Emergency Railroad Transportation Act of June 16, 1933. This act, as later extended, vested in a Coördinator of Transportation, for a period of three years, powers that were intended not to bring about the consolidation of competing railroads, but greater coöperation on their part and a greater joint use of terminal and other facilities. The aim of the Act was to lessen the costs, while increasing the efficiency, of railroad service. The labor provisions of the Act of 1933 placed a handicap upon constructive action by the Coördinator, a handicap that was removed by an agreement reached by the railroads and their employees only a few months before the office of Coördinator of Transportation went out of existence by

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statutory limitation, June 16, 1936. However, had the labor section been omitted from the Emergency Transportation Act of 1933, it is doubtful whether the Coördinator could, under the conditions that prevailed, have effectively exercised the powers that the statute temporarily vested in him. The investigations made and the reports prepared by the Coördinator and his staff have, however, been of much value, and will be influential in shaping the future policy of the railroads and of the Government in regulating them.

It is becoming increasingly manifest that there should be a greater measure of coöperation among the railroads in supplying and using facilities for the service of the public. This can be accomplished to some extent, and there is evidence that it will be, by common action of the carriers under the guidance of the Association of American Railroads. The Interstate Commerce Commission also can, without additional legislation, do something to further the common use of present facilities, and the joint action of carriers in providing additional or new facilities. A greater degree of coöperation is possible and probable, even without the grouping or consolidation of the railroads into a limited, or largely reduced, number of systems.

It is, nonetheless, desirable to bring about the ultimate grouping of the railroads as was contemplated by the Transportation Act of 1920. With the railroads again in a stable and prosperous condition, railroad grouping can be accomplished, in part, by voluntary action of the carriers under the guidance and with the coöperation of the Interstate Commerce Commission. The adequate and satisfactory grouping of the railroads will not be possible without legislation by Congress. The first step to take is to repeal the requirement that a particular railroad consolidation, by voluntary action of the carriers, must be in accordance with a prearranged general plan of grouping prescribed by the Government. The Commission should be free to pass upon the merits of each application for permission to consolidate. In acting upon an application the Commission will need to decide not only whether, in the public interest, it should be refused or granted, but also whether an approval of the application should be conditioned upon such changes in the proposed consolidation

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and terms thereof as the Commission may stipulate and require.

The grouping or consolidation of the railroads into larger systems by action of the carriers would be facilitated, and possibly adequate grouping would be made possible, by adopting the suggestion that was made by the Coördinator of Transportation of giving "any carrier which wishes to bring about a unification that the Commission finds will actively promote the public interest . . . authority, if necessary, to employ the power of eminent domain," the Commission to determine "the value of the property condemned" subject to review by the Courts "as to errors of law or arbitrariness."

The method by which grouping of railroads should be furthered or brought about will, naturally, depend upon the kind of grouping or consolidation that is made. The grouping contemplated by the Act of 1920 was to be brought about by building around the present large systems. Another plan would be to divide the country into a limited number of districts, create a Federal corporation for each district, and give that corporation the power to acquire and absorb all the railroads in its district. Such a plan would not have been a wise one. It would have given each of perhaps 12 or 15 corporations a monopoly of railroad transportation in a large section of the country, and the effect would be, as the former Coördinator of Transportation has pointed out, to reduce railroad competition as a whole while continuing competition at certain favored points, which would thereby have special advantages as locations for industries.

The artificial and compulsory grouping of all the railroads in the United States into five or seven great systems would also be unwise. Approval may well be given to the opinion expressed by the Coördinator, and quoted in Chapter XV of this treatise, that the result of such a grouping would be that, "The present uneven distribution of competition would be accentuated, with enhanced danger that population and business would tend to concentrate at favored points, a most serious danger from the standpoint of proper development of the country." The investigation that has been made for and by the Interstate Commerce Commission indicates the wisdom of furthering the grouping of the railroads of the country into about 20 systems built around

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and into the larger existing systems. By so doing, the public would continue to enjoy the beneficial results of intersystem competition, while the incentive to progress and achievement that is inherent in private ownership and operation would continue to be effective. The foundations upon which this generalization rests have been sufficiently set forth in the earlier parts of this volume.

The grouping of the railroads in the manner suggested may be made the means by which the railroads as a whole may be put upon a stable financial basis for the future, at least upon a more stable basis than they now are on. This was the purpose—or one of the purposes—that Congress had in mind in adopting the railroad consolidation provisions of the Transportation Act of 1920 which required the Interstate Commerce Commission to prepare a plan for the consolidation of the railroads into a limited number of systems “so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, so far as practicable.” This may not be a possible result of the grouping of railroads, but if railroads are grouped into systems at values which correspond to the capitalization of the earning capacity of the several properties—and such values would be both legal and equitable—the grouping would result in systems as financially stable as corporate structures can be made in a period of changing economic conditions. This much is certain, that when and as the railroads are grouped into systems with capitalization corresponding to earning capacity, the first essential step will have been taken to bring about the financial stabilization of the railroads. The next and the continuing task to be performed will be for the Government so to regulate the relations of the railroad systems with each other and with other agencies and means of transportation and so to fix the charges of the railroads as to enable them, under honest and efficient management, to maintain themselves upon a stable financial basis.

The successful regulation of the railroads can be accomplished only by the regulation of transportation—of all the agencies of transportation. The consolidated railroad systems of the future

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must be interrelated and complementary parts, first, of the country's railroad system as a whole, and, second, of the country's general transportation system. Intelligent and effective government regulation of the railroads involves the appropriate adjustment of the relations of the railroads to each other and to the several non-railroad agencies of transportation.

### REGULATION OF HIGHWAY TRANSPORTATION AND CARRIERS

Each state has jurisdiction over the highways within its boundaries. The construction and maintenance of roads outside of municipalities and the regulation of the use of them is primarily a function of the states. The Federal Government may aid the states, and latterly has given them very generous assistance, in constructing and improving highways; and the Federal Government, having authority over interstate commerce, has undertaken the regulation of interstate motor carriers; but each state may and does determine its policy concerning the financing of highways and the regulation of their use. A series of decisions of the United States Supreme Court has defined the powers of the states as regards the regulation of the use of their highways, and the boundary line dividing state and Federal authority over highway transportation and carriers has been clearly defined. The states, especially from 1931 to the present, have been rapidly developing their policies regarding the financing of highways and the regulation of motor transportation and carriers.

One consideration that should be controlling in the development, by the states and the Federal Government, of their policy of government regulation of highway transportation and carriers is that the highways should be regarded as a definite part of a general public transportation system that also includes the railroads, the waterways, and the airways. The policy pursued in developing highways, and in regulating highway transportation and carriers, should not place an undue burden upon, nor tend to weaken, the other interrelated parts of the transportation system as a whole. Highways and the carriers thereon, as compared with the railroads and the users thereof, have been, and now are, the favored recipients of public aid. The State of Texas,

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by its Motor Carrier Act of 1931, set a good example when it sought by regulation to bring about such a traffic use of the highways and the railroads in the state as would be in the best interest of the public. The two facilities and agencies of transportation, the highways and the railroads, should both be so regulated that each will be adequately developed and will be used for the service it can best render.

The importance of greater uniformity of highway regulation by the states and of a larger measure of coöperation and comity among the states in the regulation of highway vehicles and carriers is being increasingly recognized. The private passenger automobile, the trucks of private and contract carriers, and the buses and trucks of common carriers circulate freely and widely over the highways quite regardless of state boundaries, and, as regards most states, without let or hindrance so long as state regulations as to drivers, vehicles, and weights carried are not openly violated. However, state regulations vary largely; and, when each state seeks to enforce its rules as to vehicles from other states, interstate friction may and does develop. This can be greatly reduced, to the advantage of the states as well as the users of the highways, by interstate coöperation in bringing about greater uniformity in their regulatory laws. Absolute uniformity is not to be expected. The highways of the several states do not all conform to a common standard; and transportation conditions are not alike in level and mountainous sections of the country. Legislation and regulatory requirements will necessarily be affected by these differences; but not to such extent as greatly to limit the possibility of bringing about practical uniformity in the legislative policy and administrative practice of the states.

The Federal Motor Carrier Act of 1935 will assist in bringing about greater uniformity in state regulation of highway transportation and carriers. The policy of harmonizing state regulation with that of the Federal Government is already causing state statutes to be amended, and this tendency may be expected to be increasingly manifest. Moreover, the coöperation of representatives of the states in the joint boards (of which there will eventually be 91) that are created under the Motor Carrier Act of 1935 to assist the Federal Government with its task of regulating

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interstate motor carriers will doubtless have the effect of causing the states to give greater consideration to harmonizing their laws and practices with each other as well as with those of the Federal Government.

Another task that must be performed if the regulation of highway transportation and carriers is to be satisfactorily accomplished is the effective administration of state and Federal laws applying to the highways and their users. The task is by no means an easy one; but, now that the Federal Government has, with earnestness of purpose, undertaken the regulation of interstate highway commerce and carriers, there will be coöperation of state and Federal administrative authorities. This will, quite certainly, increase the incentive and the zeal of such state agencies as have in the past been unduly lenient to make as good a showing as other state agencies are making in the enforcement of statutory and administrative requirements.

### WATERWAY TRANSPORTATION POLICY

The policy of developing and regulating the use of inland waterways in the United States is still in the making. Large sums are now being spent upon river improvements and canal construction. The present period of active construction and improvement of inland waterways began during the first decade of this century when each autumn there was a shortage of railroad cars, and when the highways were still used almost entirely for local traffic. The rapid development of the country seemed to make it necessary to supplement the transportation facilities by the development of waterways. A decade after this revival of interest in inland waterways the World War came, creating temporarily an extraordinary demand for transportation services. The impetus given waterway development by the World War carried forward the construction programs. In each of several sections of the country those interested in waterway improvements organized and pressed their claims strongly and effectively. When the Federal Government adopted a program of engaging largely in the construction of public works to provide employment for



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those that the business depression had made idle, large sums from appropriations for relief were allotted for waterway improvements, including canal construction, river canalization, and the construction of dams to regulate stream flow, to provide water for irrigation and for the generation of electric power. The waterway development policy became a part of a program for the utilization of the water resources of the country for the accomplishment of social and economic aims. This is bringing about a rapid increase in the mileage of navigable inland waterways, although the canalization of rivers (such as the Tennessee River, for example) for navigation is only a minor part of the results to be secured by expenditures made for the utilization of water resources.

The natural waterways, having from time immemorial been one of nature's gifts to man, have been and still are regarded as a guardian of the public against unfair treatment by artificially created, private agencies of transportation. As transportation facilities other than those by water have been developed and improved and have occupied the general field of transportation services, it has been necessary to spend large, and increasingly large, sums upon waterways and water transportation facilities to enable them to continue in use as a part of the present-day transportation system. Logically, those who use waterways created or improved at public expense should pay for the use of the waterways; but no tolls are charged. The public still regards the waterways as free ways; it is true that much may have been spent in improving or creating the waterways, but the expenditures, it is felt, were from public funds and upon public waterways. Why, it is asked, should those who use public ways pay for their use? Of course, the real answer to the question is not difficult. When private carriers, or carriers for hire, perform services by the use of facilities provided at public expense, the public—the taxpayers—bear a part of the costs of the service. The carriers, or the shippers they serve, are receiving a subsidy from the Government. When the country was without adequate transportation facilities, and when economic development and social well-being were being hampered and restricted by lack of trans-

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portation, such a subsidy would be beneficial to the public as well as to the immediate recipients; but when there is a surplus of transportation facilities, can such subsidies be justified?

Waterways, under present-day conditions, are a part, and should be regarded as a part, of a general and highly developed transportation system comprising railroads, pipe-lines, highways, and airways, as well as waterways. All parts of the system should stand upon their own footing. Each should receive like treatment, each being given an opportunity to render the service it can most efficiently and economically perform. Insofar as the services are performed by the use of facilities provided and maintained at the expense of the general public, those who are served by those facilities should pay for their use. In the case of a new transportation service, such as that rendered by air carriers, there may be a promotional period during which the public, to its own advantage, may properly and wisely bear a part of the expense of providing necessary facilities; but transportation by water is no longer a new service to be regarded as in the promotional period of its development.

Waterway policy in the United States, as it has developed, has been particularly subject to the influence of political pressure exerted by local interests and by those seeking the political support of such interests. To adopt and carry out a consistent national policy concerning the development and regulation of a general national transportation system, it is necessary to deal with waterways from a national point of view. The policy regarding waterways should be determined by national interests and not by the political pressure of local interests. However, one must admit that such advice is more easily given than carried out.

The hope of developing a rational rather than an emotional waterways policy will be strengthened if the pending legislation, or similar legislation, is enacted for the comprehensive Federal regulation of transportation and carriers by water. By such regulation, the place of waterways in the country's transportation system as a whole will be more definitely determined. By applying to all classes of carriers like principles of regulation, each class will, or should, be given an opportunity to function freely

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in the performance of the services it can best render. The purpose and result of government regulation of transportation by water will not be to limit the usefulness of waterways and carriers, but to enable them to take their place as a definitely defined part of a coördinated transportation system.

### POLICY CONCERNING AIR TRANSPORTATION AND CARRIERS

Carriage of persons and property by aëroplanes and airships is the latest kind of transportation. It is most remarkable that within the brief period of three decades the gasoline engine should have revolutionized highway transportation, producing the fundamental social changes resulting therefrom, and should have converted aviation from the dream of poets into a practical and efficient means of transportation that has brought the people of each country and of the world into close touch with each other. Aviation has added to transportation as it had previously developed a new service that is more complementary to, than competitive with, the services of other transportation agencies and facilities.

The costs of air transportation per unit of weight and distance are relatively high. Eventually the service may be put upon a self-supporting basis; but for the present it is not self-sustaining. It is in the experimental stage of its development, and government assistance is required, if the public is to be served by a well-organized country-wide system of air transportation.

The present service of air carriers in the United States has been made possible by the government's action in laying out, equipping, and maintaining airways. Air transportation is mainly interstate, and airways are interstate ways. They have been provided by the Federal Government, which is concerning itself constantly with technical improvements in the equipment of the airways and in the equipment of aëroplanes. The private interests, both those engaged in the manufacture of aëroplanes and those that operate the planes, are receiving the coöperation of the governments, Federal, state, and local, in furthering the development of aviation and air transportation. The air terminals are mostly provided by the municipalities, which are now receiving Federal

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assistance, while other landing fields are being provided both by Federal, state, and local governments, and by private interests.

There is general agreement that liberal government aid to aviation and air transportation is justified and is in the public interest. There is also no question as to the necessity of carefully planned and stringently enforced safety regulations applying to the manufacture of aëroplanes, the equipment employed in aviation and the qualification of the airmen who operate the equipment. It is essential to public safety that no plane should be operated unless it is duly licensed and unless it is periodically inspected by public authorities. Air terminal and other necessary aviation facilities should also be subject to government supervision and approval. In the licensing of aircraft and the supervision of facilities both the Federal and state governments participate. While the states have unquestionable authority to require all aircraft that are operated only in intrastate flights to have a state license, it would be better, in view of the fact that most air routes and services are interstate, for each state to require all aircraft operated within its borders to obtain a Federal license. This policy has been adopted by most of the states.

To provide the necessary inspection of aircraft and to enforce adequate safety regulations is a difficult task; but, while the Bureau of Air Commerce of the United States Department of Commerce has been subject to some public criticism, it seems to have rendered an efficient service. Doubtless experience will point the way to more effective safety regulation and to a further reduction of the risks of travel by air. The complete elimination of accidents cannot be hoped for while mechanical and mental mechanisms are subject to unforeseeable breakdowns.

Government assistance to aviation, at least for some time to come, cannot stop with providing airways and terminals and with measures to increase the safety of the operation of aircraft. The establishment, performance, and development of well-organized passenger, mail, and express services upon the country-wide system of airways cannot be profitably and successfully accomplished by private enterprise without government aid. From 1926 to the present the Federal Government has assisted the major air carriers by payments for carrying mail—the payments

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being made enough larger than the expenses of air-mail transportation to enable the carriers to provide and develop the passenger and express services for which there is public demand. It is questionable whether mail subsidies are the kind of aid that should be given. The recommendations made by the Special Aviation Commission in the report it submitted in January, 1935, merit careful consideration. The Commission "suggested the desirability of paying the air lines for handling the mail at a fixed rate per pound per mile," and that the "rate should be determined from time to time . . . as the rates for carrying mail by rail are prescribed by the Interstate Commerce Commission." The Aviation Commission further recommended that:

The direct financial aid given to air lines should be under the constant control of the commission [that regulates air transportation], and subject at all times to revision as technical improvement, changes in operating conditions, or the needs of the particular territory served may require. The formulas under which aid is extended should be such as to encourage good management and technical progress, and to stimulate rapid evolution towards complete self-support and independence of direct government aid.

To carry out this recommendation, Congress would need to amend the Air Mail Contract Acts of 1934 and 1935, and give the Interstate Commerce Commission the same authority over payments for carrying air mail as it has over the compensation of the railroads for carrying mail. Congress would also need to make appropriations for subsidizing air-line carriers and vest in a commission—and it should be the Interstate Commerce Commission—authority to inform itself thoroughly regarding the expenses and receipts of each air-line carrier, and to grant each approved line such subsidy as it would need to have in order to perform the services deemed by the Commission to be required for the adequate service of the public.

Government aid to air transportation should be accompanied by appropriate public regulation of the services, finances, and accounts of air carriers. The regulation should be by the Federal Government and should begin with requiring each interstate carrier to obtain a certificate of public convenience and necessity, or, if a contract carrier, a permit, before engaging in business. The

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public is interested in being served by efficient carriers capable of improving their services with the advance in technical improvements and with the growth in traffic. The carriers themselves will benefit by government regulation that will prevent the lines that are in service from excessive and cut-throat competition by carriers that, without public regulation, can begin operation upon routes that are already adequately served.

In general, the Federal Government should apply to transportation and carriers by air the kind and degree of regulation that is being exercised over carriers by rail and road. Probably the prescribing by the Commission of the fares and charges of air carriers may well be postponed for a while until further experience in the operation and development of air transportation has shown what general adjustment of fares and charges should be made. It would likewise seem to be advisable to leave with the Bureau of Air Commerce of the Department of Commerce, as least for the present, the promotion of air transportation by the Federal Government and the enforcement of safety regulations. If experience should indicate the desirability of transferring to the regulatory commission the functions now being exercised by the Bureau of Air Commerce, such transfer can then be made. For reasons that will be stated in the following and concluding chapter, the general regulation of interstate air transportation and carriers by the Federal Government should be vested in the commission that has jurisdiction over other transportation and carriers.

## CHAPTER XXVII

### UNIFICATION OF THE FEDERAL REGULATION OF TRANSPORTATION

THERE are three reasons why the Federal regulation of all the agencies of transportation over which regulatory jurisdiction is exercised should be vested in one authority.

One reason is that the several means or agencies of transportation, the railroads, the pipe-lines, the highways, the waterways, and the airways, are inseparably interrelated. They all serve, not only individually but collectively, in performing the transportation required or desired by the public. They constitute a transportation system. The task to be performed by the Government is the regulation of transportation as a whole and in the general public interest. This involves the regulation of all the agencies of transportation by applying to each of them like principles of regulation for the accomplishment of a common purpose, that of enabling each agency to function advantageously and appropriately as a part of a national transportation system.

Another reason for the Federal regulation of all the agencies of transportation by one authority and in the manner indicated is that it is the prerequisite to bringing about and maintaining that coördination and coöperation of transportation agencies that is essential to the functioning and development of the most efficient and economical national transportation system. If the several agencies and facilities of transportation are regulated by separate and dissociated authorities, there cannot fail to be some conflict in policy. There will be a tendency for each authority to uphold its jurisdiction and prestige as against other authorities, to formulate and follow a policy of regulating its particular kind of transportation without due regard to its relation to the several agencies that compose the country's transportation system as a whole. The effect will be to emphasize competition among, and the dissociation of, the several kinds of carriers rather than their

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coöperation and coördination. Moreover, if some kinds or agencies of transportation are regulated and others are not, or are but very partially regulated as is the situation at present, the unregulated carriers will be left free to engage in competitive warfare, the unregulated competition being among carriers within each group and between groups of carriers. The desirable coördination of carriers and the coöperative functioning of the carriers as component parts of a transportation system cannot be brought about without the regulation of all carriers and their regulation by the appropriate application to each class of carriers of like principles of regulation.

The third reason for unification of the Federal regulation of transportation is that only by vesting the regulation of all agencies of transportation in one authority will it be possible to carry out a consistent general policy of regulation. That this is a fact as well as a theory is shown by the experience we have had, and are having, in the regulation of different kinds of carriers by different and dissociated authorities. Fortunately we have placed the regulation of interstate highway carriers with the authority that has had long experience in regulating railroads and that also has jurisdiction over pipe-lines; but such regulation of water carriers (other than those having joint routes and rates with the railroads) as has been provided for has been exercised, in turn, by the Shipping Board and the Department of Commerce and is now vested in the recently created Maritime Commission. Federal authority over air transportation and carriers is vested mainly in the Secretary of Commerce and partly in the Postmaster-General and the Interstate Commerce Commission. Until the present Federal practice of dividing the regulation of transportation and carriers among several authorities is changed it will hardly be possible to formulate and carry out a consistent general policy of regulation.

### TRANSPORTATION REGULATION BY THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission is the authority that should be given jurisdiction over the regulation of the several



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agencies of transportation. The Commission has had fifty years of experience. Starting with limited jurisdiction and powers, greater authority has been given the Commission, from time to time, over the railroads and the other carriers that have been made subject to the Interstate Commerce Act; and the enlarged jurisdiction and authority have been exercised with increasing ability. The carriers regulated as well as the general public have confidence in the intelligence, judgment, and fairness of the Commission. The Commission is a branch of the Government that has functioned independently, free from executive domination and without undue legislative limitation of its administrative action. It should be, and presumably will be, kept independent and without association with an executive department of the Government. For the most part, high standards have, in the past, been maintained in the selection and confirmation of the members of the Commission; and the Commission is especially to be commended for having insisted that the personnel of its staff shall consist of those who have met the merit tests prescribed by the Civil Service Commission.

It has been thought by some that the Interstate Commerce Commission having through most of its long period of activity devoted itself mainly to the regulation of railroads must thereby have become "railroad minded," and thus disposed to favor the interests of the railroads as against those of other carriers subject to its authority. That this not unnatural apprehension may be dismissed is made clear by the fact that in the exercise of its limited jurisdiction over carriers upon inland waterways—over the establishment of joint rail-and-water routes and rates—the Commission's policy has been to give the carriers by water full opportunity to engage in through traffic under favorable conditions. There is, moreover, no evidence that the pipe-lines, which are serious competitors of the railroads, have been hampered in the development of facilities and traffic by having been made subject to regulation by the Commission. Nor is there any evidence that interstate motor carriers are being dealt with differently than are the railroads, unless it be that the Commission, in carrying out and applying the provisions of the Motor Carrier Act of 1935, is exercising special care not to impose undue bur-

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dens on motor carriers while they are meeting the requirements of a statute providing at one stroke for comprehensive regulation.

To vest the regulation of carriers by water in the Interstate Commerce Commission will be to extend the Commission's jurisdiction generally over a field, concerning which it has already gained much knowledge in the exercise of the limited authority it now possesses over the carriers by water that are under the present Interstate Commerce Act. Moreover, the Commission's task will be to apply to carriers by water the principles and policy of regulation that have been developed during its long experience in regulating transportation agencies and services. The task of regulating carriers by water does not differ fundamentally from that of regulating other carriers, and it is a task that can be performed more intelligently and more successfully by the Commission that regulates the carriers with which carriers by water have a competitive and complementary relation. It will be to the benefit of each part of the general transportation system to have the system as a whole regulated by one governmental authority.

For the reason just stated the Federal regulation of the entry into business, the services, finances, and accounts of interstate air carriers, if and when provided for, should be vested in the Interstate Commerce Commission. Whether and when the regulation should include authority over the rates and charges of air carriers, and whether, as now seems advisable, the promotion of air transportation facilities and the formulation and enforcement of safety regulations should remain with the Department of Commerce, are questions that may well await decision until experience indicates what may best be done. It is especially important, and in the interest of both the air-line carriers and the public they serve, that carriers proposing to engage in service should be required to prove to the Interstate Commerce Commission that the proposed service is needed and that the applicants are qualified to render the services that they propose to perform. Moreover, the time has come when the Government's policy of aiding and regulating air transportation should no longer be based upon the assumption that scheduled air-transport service is exclusively or primarily a mail service. As the Interstate Com-

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merce Commission says in its 1936 Annual Report, "the transportation of persons and property has grown to such volume and extent in recent years that transportation by air has become an integral part of the transport system of the nation and should be regulated as such."

### ADMINISTRATIVE ORGANIZATION FOR TRANSPORTATION REGULATION

If the regulation of all interstate transportation and carriers by land, by water, and by air is vested in the Interstate Commerce Commission, what administrative organization of that body will enable it to function most successfully? Moreover, should the organization be determined by the Commission acting without a congressional mandate, or should it be prescribed by Congress by legislation based upon recommendations made by the Commission, or by legislation enacted without request or suggestions from the Commission? Should the organization be determined by the exercise of administrative discretion, or should it be prescribed by legislation?

When Congress adopted the Motor Carrier Act of August 9, 1935, and provided for the comprehensive regulation of interstate motor transportation by the Interstate Commerce Commission, the enforcement and administration of the new law, which was made Part II of the Interstate Commerce Act, were vested in the Commission without any mandate as to the organization by which the Commission was to function in the performance of its additional duties. As has been stated, the Commission recast its organization, reducing the number of its divisions from seven to five. To Division 5, which included three members of the Commission, were assigned matters arising under the Motor Carrier Act, and, subject to this Division, there was created a new Bureau of Motor Carriers. Furthermore the Commission provided that, in the regulation of motor carriers, Division 5, and the Bureau of Motor Carriers should function through an organization of their own, instead of being served by the bureaus that were assisting the Commission in the administration and enforcement of Part I of the Interstate Commerce Act which has to do with railroads, associated carriers, and pipe-lines. The details involved in

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administering the Motor Carrier Act were allocated among seven sections of the Bureau of Motor Carriers. By this action the Commission has not fundamentally changed its general organization, but has created within that organization a division and a bureau through which the Commission as a whole will function in performing its task of regulating motor transportation and carriers.

When early in the first session of the 74th Congress there were reintroduced, with modifications, the bills that had been presented to the 73rd Congress for the Federal regulation of motor carriers and of carriers by water, the Coördinator of Transportation submitted to the Interstate Commerce Commission and to the appropriate committees of Congress the draft of a bill for a general reorganization of the Commission. The motor carrier bill became the Act approved August 9, 1935, the administration of which was vested in the Commission without any instructions from Congress concerning the manner in which the Commission should organize in performing its additional task. In the matter of commission organization Congress did not adopt the views of the Coördinator, but was guided by the judgment of the Commission, only one of whose members, other than the Coördinator, favored legislation prescribing in advance the organization by which the Commission should function in administering the regulatory statutes enacted by Congress.

The high standing that Commissioner Joseph B. Eastman has attained as the result of his experience as one of the outstanding members of the Commission, and because of his three years of service as Coördinator of Transportation, gave special significance to his recommendations as to a reorganization of the Commission. His suggestion was that the membership of the Commission be increased from 11 to 15, including a chairman and 14 other members. The proposed organization would consist of a permanent chairman, a finance division of three members, a railroad division of five members, a water and pipe-line division of three members, a motor and air division of three members, and a control board having for its chairman the chairman of the Commission and for its other members the chairmen of the four divisions. The chairman of the commission would (preferably to the author

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of the plan of reorganization) be appointed by the President, but might be selected by the Commission to serve throughout the period of his commission membership. The members of each division would be designated by the Chairman of the Commission, provision being made that at the end of each two-year period one member of each division, other than its chairman, might be shifted to another division. The control board, consisting of the Chairman of the Commission and the division chairmen, would have authority to establish precedents binding upon all divisions. The Chairman of the Commission would assign matters to appropriate divisions for action, and the action of a division would be final. A dissatisfied party might appeal to the division for a rehearing, or "if it were alleged that the matter involved a question which should have been referred to the control board, the petition would go in the first instance to that board, which would have authority in its discretion to grant or deny, or refer the petition to the appropriate division for action."

The advantages which the Coördinator believed this plan of commission reorganization would have were: (1) that the Commission would have "a permanent executive officer relieved from many routine duties and with the specific duty of promoting the expeditious and efficient conduct of its business"; (2) that there would be "specialization in the regulation of the different types of carriers" with "provisions for the coördination of regulation through a control board"; and (3) that "no matter would be determined by a body of more than five members . . . thus avoiding the time-consuming deliberations of a larger body."

The Coördinator recommended the enactment of legislation adopting the proposed plan for the reorganization of the Interstate Commerce Commission to accompany the passage of laws for the Federal regulation of motor carriers and water carriers. The water-carrier bill has not yet become a law; and, as stated above, Congress left the Commission free to organize in its own way for the administration of the Motor Carrier Act; and it is probable that in so doing Congress was influenced by the objections that the Commission made to the proposal when it submitted to the President and to Congress the plan of reorganiza-

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tion recommended by the Coördinator of Transportation. The position taken by the Commission, in January, 1935, when it transmitted the Coördinator's plan was that:

Any present increase in the number of Commissioners is unnecessary from the standpoint of efficiency in work, and should be left for consideration until after the Commission may have experience with any new duties which may be imposed.

It is not possible to prescribe by law with precision and in advance the form of administrative organization and detailed assignments of functions, duties, and methods of operation among rigidly fixed divisions of the Commission which will best enable us to perform the duties which may come upon us in the future. It is, rather, the part of sound policy to leave the details of the organization to the body which will be charged with continuing responsibility for results. Even without change in duties, the form of organization best adapted to performance of functions necessarily changes from time to time, and to achieve efficiency the organization form should be capable of prompt alteration in response to changes in circumstances or Commission personnel. An act of Congress should not be requisite to enable the Commission to make necessary changes in its internal organization.

The Commission not only thought it unwise for Congress to prescribe the form of organization by which administrative functions were to be exercised; the Commission objected to the plan *per se*. Its criticism of the plan included the statement that:

The plan seems to us to have positive disadvantages. The so-called "Control Board," proposed to be set up from among members of the Commission, will in essence be the Commission. The remaining members, more than a majority of the whole number, while still to be called Commissioners, will be little more than examiners, and privileged to vote in the disposition of but a limited class of cases. While theoretically they will be equals with the Commissioners who are to sit as members of the Control Board, they will have no voice in any matters of administration; they cannot advise with their colleagues, except through courtesy; and they will not join in the reports of the Commissioner to Congress. Such a form of organization must result in discord and in inefficiency and lack of concert of action.

On the whole, it would seem best for Congress to leave to the Interstate Commerce Commission to determine the administrative organization by means of which it can most efficiently and effectively regulate the several kinds of carriers over which it has

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been given, or may be given, jurisdiction. It is for Congress to determine the scope of regulation, and to enact regulatory legislation that is based upon sound principles and is constructive in purpose. The Commission that is charged with the duty of enforcing and administering the legislation should be given such executive discretion as will enable it to apply the general mandates of Congress effectively and constructively to the regulation of a dynamic industry, to the adjustment, in the best interest of all concerned, of the changing relations of the several kinds of carriers with each other and with the public they serve. The problem to be solved is the regulation, by appropriate legislative and administrative action, of transportation as a whole, of a co-ordinated system of transportation comprising the facilities and services of carriers by railroads and pipe-lines, by highways, waterways, and airways.





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